SUPREME COURT. U. S.

JUL 10 1967

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In the
Supreme Court of the United States

October Term, 1966

No. 342

BLAIR MANUFACTURING COMPANY,
Petitioner,

vs.

EMMETT HAMPTON
and
HAMPTON DISTRIBUTING COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT (AND APPENDICES).

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Blair Manufacturing Company prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered herein. (Judgment appears as Appendix C)

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 374 F. (2d) 969 (May 29, 1967 issue of Advance Sheets) and is printed as Appendix A hereto. The opinion of the United States District Court for the District of Nebraska, by John W. Delehant, Senior Judge, is unreported but is printed as Appendix B hereto.

JURISDICTION

Judgment of the Court of Appeals was entered April 5, 1967. Motion for rehearing was filed April 24, 1967 and was denied May 3, 1967. Jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

(1) Do this Court's decisions in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U. S. 225 and in *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U. S. 234 limit the power of the District Courts to protect and enforce their orders, judgments or decrees?

(2) The opinion of the Court of Appeals herein is in conflict with the opinions of the Court of Appeals for the First and Fourth Circuits.

(3) Do this Court's decisions in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U. S. 225 and in *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U. S. 234 preclude the assertion of equitable remedies by one who has had blueprints, drawings or trade secrets stolen from him; or

have the Patent Laws of the United States preempted the field and thereby precluded the assertion of common law rights to protection of blueprints, drawings or trade secrets as against one who has unlawfully acquired them?

STATEMENT OF CASE

This action is an ancillary proceeding arising out of a sale of assets by the Trustee in Bankruptcy in the Bankruptcy Proceedings of Kelly-Ryan Equipment Company of Blair, Nebraska.

On February 8, 1955, Kelly-Ryan Equipment Company filed in the United States District Court for the District of Nebraska a petition as debtor under Chapter X of the National Bankruptcy Act, as amended, for the Corporate Reorganization of Kelly-Ryan Equipment Company under title 11 U. S. C., Section 501, et seq. On the same day said petition was approved and a Trustee appointed. In 1963, no plans of reorganization having been developed, the District Court authorized the Trustee to investigate and negotiate for the possible sale of the debtor corporation or its assets. (Infra, pp. 24, 26)

Responsive to this authorization, bids were received by the Trustee and at a hearing held September 19, 1963, the bid of Blair Manufacturing Company was accepted whereby Blair Manufacturing Company would purchase for the sum of $300,000 the following described assets (S. R. 5-6):

> "* * * said Trustee hereby is authorized to sell to Blair Manufacturing Company, free and clear of all liens and encumbrances, all the assets of Kelly-Ryan

> Equipment Company, the above named debtor corporation, of every kind, type, and description, real, personal, and mixed, tangible and intangible, and wherever located, including all stock-piled and consigned items and any other items in the hands of others than the debtor, the corporate name, all lease and contract rights, and the approximately two-acre piece of supporting real estate at the river plant of the above named debtor, title to which is now in Nebraska Iowa Bridge Company. * * *"

The order then proceeded to exclude from the above assets certain items none of which are material to the matters now before the Court.

Possession of the described assets was delivered to petitioner on September 26, 1963, pursuant to an Order of the District Court dated September 25, 1963 (Infra p. 32). Thereafter the respondents without any authority surreptitiously and unlawfully took from the files of Kelly-Ryan Equipment Company certain blueprints, drawings, and tracings of the feeder wagon, elevator, and manure-spreader which the debtor corporation was producing, and which blueprints, drawings, and tracings were part of the assets purchased by petitioner. Respondents then caused copies of these blueprints, drawings, and tracings to be made and proceeded to use these copies for the purpose of producing a feeder wagon which was substantially identical to that of Kelly-Ryan Equipment Company. When these actions of the respondents came to the attention of petitioner, proceedings were instituted in the District Court seeking an Order requiring respondents to return to petitioner copies of all such blueprints, drawings, tracings and further to restrain them from in any way using the information which was thus unlawfully obtained. This petition was heard in the District Court on October 22 and 23, 1963, resulting in an Order directing respondents to forthwith surrender all drawings, and plans and copies thereof relating to feeder wagons and enjoining the use of any such documents or copies thereof (R. 4-6). On November 27, 1963, this Order was amended and broadened by stipulation of the parties to extend coverage to drawings and plans relating to elevators and manure-spreaders as well as feeder wagons (R. 7-10). While the respondents had caused 967 copies to be made of the blueprints and plans of Kelly-Ryan Equipment Company, the evidence conclusively established that only 622 of these were ever returned to petitioner pursuant to the Orders of the District Court (S. R. 10-12). This, coupled with the production in early December, 1963, of a substantially identical feeder wagon to that contained in the prints of Kelly-Ryan Equipment Company, gave rise to the petition herein seeking a modification of the prior Orders to restrain the respondents from making any further unlawful use of the blueprints or copies and the information contained therein (R. 10-13).

Trial of this matter was held on July 29 and 30, 1964 and the Court entered its opinion on March 10, 1966 (Infra pp. 23 to 101), which resulted in the preparation and filing of findings of fact and judgment under the date of March 24, 1966 (R. 30-33).

In its opinion, the District Court specifically found that Emmett Hampton occupied, rent free, offices in the main office building of debtor's corporation while it was under the management of the Trustee (Infra p. 63). That after Hampton became convinced that his bid for the assets would not be accepted, he secured and took possession of the blueprints in question "to the end that he might, and with the intention that he would, use them to enable himself, and Hampton Distributing Company thereafter to compete, or to facilitate and expedite his and Hampton Distributing Company's then actively contemplated competition, with Blair Manufacturing Company * * *." That he caused 967 copies to be made of said blueprints and in response to the prior orders of the District Court had returned only 622 (Infra p. 67).

The court then held: "The court has no manner of doubt that, given adequate time and numbers, and skills, of men, such copying would be possible. But the court is even more firmly persuaded, and finds, that the actual duplication here under consideration, and which alone is presently involved, did not result from such an effort" (Infra p. 75).

An exhaustive analysis of the facts and applicable law may be found in the opinion of the District Court printed herein as Appendix B. We particularly direct the Court's attention to pages 44 to 45, 59 to 64, 65 to 76, and 80 to 84 thereof.

During the pendency of this proceeding, no temporary injunction or restraining order was issued by the District Court, nor have respondents ever filed a supersedeas bond.

In addition, two contempt proceedings have been instituted against respondents for failure to comply with the permanent injunction (R. 34-37).

The Court of Appeals held that "Hampton's conduct in his surreptitiously obtaining and copying the blueprints of drawings of Kelly-Ryan *and its failure to obey the orders* *of the Court to turn over such documents and not use them is indefensible* and warrants the fashioning of equitable relief. While a fact dispute exists, substantial evidentiary support exists for the Court's finding that Hampton retained some copies of the blueprints and drawings and made use thereof in manufacturing feeder wagons substantially the same as those manufactured by Kelly-Ryan. Such use of the plans accelerated the time in which Hampton was able to produce the wagons." (Emphasis supplied.)

The Court of Appeals further held: "We believe that under the facts here the Court would have been justified in restraining the production of substantially similar implements * * *," but then went on to hold that under the holding of *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U. S. 225, and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U. S. 234, such injunction could not exceed that period of time which would have been required to reproduce such items without the aid of the plans.

The Court of Appeals held that certainly such copying could have been accomplished between the fall of 1963 and the order appealed from which was entered on March 24, 1966, and therefore concluded that no injunctive relief in this area should be granted to the petitioner. This order disregards the fact that during the period from the fall of 1963 to the order of March 24, 1966, no restraint of any kind was imposed upon Hampton with regard to the production of feeder wagons pursuant to the unlawful information which he had surreptitiously obtained from the files of Kelly-Ryan.

REASONS FOR GRANTING WRIT

(1) The Court of Appeals in its decision in this case relied solely on *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U. S. 225, and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U. S. 234, for reversing Judge Delehant. The Sears and Compco cases relate only to the lawful copying of unpatented and unpatentable articles which have been disclosed to the public. This case involves the theft of blueprints and drawings by Hampton, who at least stood in a semi-confidential relationship with petitioner and Kelly-Ryan Equipment Company, for the very purpose of going into competition with petitioner. The Sears and Compco cases deal generally with the rights of members of the public to copy unpatented or unpatentable articles, produce and sell them. This case on the other hand involves the rights of petitioner as against respondents only to prevent them from acquiring and profiting from the surreptitious and unlawful conduct of one of them in taking and copying petitioner's property. To allow the Sears and Compco cases to be thus interpreted and applied by the Court of Appeals is to allow a person to profit from the unlawful, wrongful and unjust acquisition of the trade secrets of another, and then, if he is caught, to allow him to continue to receive the fruits of his wrongful action. This places the injured party in the position of having no effective remedy whereby he may protect his trade secrets. This case presents an even worse result since the Court of Appeals concluded that even though the respondents were entirely wrong in what they did, they are to be subject to no restraint for any period of time in the use of the information illegally and wrongfully obtained contrary to the very orders of a United

States District Court. This cannot be the meaning of this Court's decision in the Sears and Compco cases.

(2) The decision of the Court of Appeals herein conflicts with the decision of the Court of Appeals for the Fourth Circuit in *Servo Corporation of America v. General Electric Company,* 337 F. (2) 716. In the Servo case written by Circuit Judge J. Spencer Bell, that court held at pages 724-725:

> "Because of the confidential relationship which was betrayed here by Southern, this case is distinguishable from Sears, Roebuck & Co. v. Stiffel Co., 376 U. S. 225, 84 S. Ct. 784, 11 L. Ed. 2d 661 (1964). In that case the action was grounded upon state law which gave a remedy for copying resulting in confusion as to the source of manufacture. In that case the Court held that a manufacturer whose design and mechanical patents are invalid for want of invention cannot under state unfair competition law obtain an injunction against copying its product, nor an award of damages for such copying, as such use of state law conflicts with the federal government's power to grant patents. The Court went on to hold that an unpatented article being in the public domain may be freely copied as the federal patent law had preempted the field from state action. This case, however, is one of unjust enrichment through breach of a confidential relationship, and the remedy is derived from the court's power to award general equitable relief. In Saco-Lowel Shops v. Reynolds, supra, 141 F. 2d at page 598, we held:
>
> > "[W]hether the [inventor's ideas] were covered by patent or not, he was entitled to protection against their use by one to whom he had disclosed them in the course of a confidential relationship."

It is also in conflict with the opinion of the Court of Appeals for the First Circuit in *Atlantic Wool Combing*

Company v. Norfolk Mills, Inc., 357 F. (2) 866, written by Circuit Judge Hastie wherein that court held at page 870:

> "The defendant stands in no better position than Lawton. Furnishing Lawton with no plans of its own, it induces him to build for it a machine like the plaintiff's, well knowing that the details of the construction of the plaintiff's machine were valuable secret information belonging to a competitor. Thus, in legal contemplation, the defendant was as blameworthy as Lawton and equally responsible.
>
> "All the circumstances considered, no legitimate interest of either Lawton or the defendant would be served by giving legal sanction to their appropriation of the plaintiff's trade secret. Rather, seekers after unearned advantage would be allowed without justification to profit at the expense of him whose valuable special knowledge they converted to their own use.
>
> "We conclude that on the facts as either found by the plaintiff or established without contradiction in the record the plaintiff is entitled to relief. We express no opinion concerning the type or extent of the appropriate remedy."[9]

Footnote 9 reads as follows:

> "9. It has been suggested that the fact, if such to be the fact that a reasonably skilled mechanic could devise a machine equivalent to the plaintiff's without using the plaintiff's secret information may justify limiting relief to money damages. See Restatement, Torts § 757 comment b. But see Franke v. Wiltschek, supra note 2, 209 F. 2d at 498, with elaborate dissent on this point by Judge Frank."

(3) The action of the Court of Appeals in declaring invalid Paragraph 2 of the Injunctive Order of the District Court can only be justified on the basis that one who wrong-

fully and unlawfully acquires the trade secrets of another should not be restricted or limited in his use of those trade secrets in any manner which is different than if they had been lawfully acquired. In reaching this conclusion the Court of Appeals relied on this court's decisions in *Sears, Roebuck & Co. v. Stiffel Co.,* 376 U. S. 225, and *Compco Corp. v. Day-Brite Lighting, Inc.,* 376 U. S. 234. This conclusion of the Court of Appeals however is contrary to all of the well-recognized principles of equity and the established law of this country relative to the protection of trade secrets. Furthermore, in this case much of the respondents' wrongdoing was in violation of the orders of the District Court (Infra pp. 20-21), and the effect of this decision of the Court of Appeals is to place a serious limitation on the power of the District Court to protect itself in its orders and judgments. This should be a matter of deep concern to this court in the proper administration of Justice in the Federal Court System.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

James J. Fitzgerald, Jr. and

Lyle E. Strom,

Counsel for Plaintiff.

Dated: July 7, 1967.

APPENDIX A

In the United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 18,465

Emmett Hampton and Hampton Distributing Company, *Appellants,* vs. Blair Manufacturing Company, *Appellee.*	Appeal from the United States District Court for the District of Nebraska.

[April 5, 1967]

Before Van Oosterhout, Blackmun and Mehaffy, Circuit Judges.

Van Oosterhout, Circuit Judge.

This is a timely appeal by respondents Emmett Hampton and Hampton Distributing Company, a corporation, hereinafter sometimes jointly called Hampton, from the portion of the final order of the District Court permanently enjoining Hampton, reading as follows:

> "2. That the respondents, and each of them, the agents, servants and employees of the respondents, and each of them, be, and they hereby are, permanently enjoined and restrained from in any manner producing any item or items, components or parts for feeder wagons, elevators and spreaders or manure spreaders which are interchangeable with the items, components and parts for feeder wagons, elevators and spreaders or manure spreaders covered by the blue prints, drawings and tracings of Kelly Ryan Equipment Company, or any copies thereof, and from in any manner producing or manufacturing or causing to be manufactured, selling or causing to be sold, feeder wagons, elevators and spreaders or manure spreaders containing any item or items, components or parts which are interchangeable with the items, components and parts for feeder wagons, elevators and spreaders covered by said blue prints, drawings and tracings or any copies thereof."

This action was instituted by petitioner Blair Manufacturing Company (Blair) in the reorganization proceedings under Chapter X of the Bankruptcy Act involving Kelly Ryan Equipment Company (Kelly Ryan), debtor. The reorganization court by order filed September 20, 1963, approved a sale of all of the assets of Kelly Ryan, subject to a few exceptions not here pertinent, to Blair, the highest and best bidder. Such sale was subsequently consummated.

Kelly Ryan was a manufacturer of farm implements, including feeder wagons, elevators and spreaders. Its business was operated by a court-appointed trustee from 1956 until the sale to Blair. Emmett Hampton had been sales manager of Kelly Ryan prior to the reorganization proceedings and thereafter he was a distributor of Kelly Ryan equipment with an office in the company's quarters and he continued in such capacity until the sale. Hampton was an unsuccessful bidder on the Kelly Ryan assets.

Emmett Hampton is the controlling stockholder of Hampton Distributing Company, owning all of the stock of the corporation except qualifying shares of directors. He is also its chief managing officer.

Shortly after the sale to Blair, Hampton, who had access thereto, withdrew from the company files blue prints and drawings relating to the manufacture of feeder wagons, elevators and spreaders. He had no authority or right to withdraw the plans for his own purposes. On October 2 and 3, 1963, the Standard Blue Print Company, at Hampton's direction, made 967 blue prints of Kelly Ryan plans and drawings and delivered the same to Hampton. The originals were then returned to the Kelly Ryan files.

Blair, by virtue of its purchases, became the owner of all interest of the trustee and of Kelly Ryan in the plans and drawings and had the exclusive right to use them. As purchaser, Blair has standing to seek the aid of the bankruptcy court in the present situation. See *Cincinnati, I. & W. R. R. v. Indianapolis Union Ry.*, 270 U. S. 107, 116.

Blair, upon learning of Hampton's possession and use of the plans, filed a petition in the reorganization proceedings setting forth its exclusive right to possession and use of the plans and drawings and Hampton's unauthorized possession and use thereof, and praying that Hampton be ordered to turn over to it all such blue prints and plans and copies thereof, and that Hampton be enjoined from making any use thereof. Show cause order was issued and served upon Hampton and after full hearing, order was entered October 23, 1963, directing Hampton to forthwith surrender all drawings and plans and copies thereof relating to feeder wagons and enjoining the use of any such papers or copies thereof. Such order was by stipulation of the parties broadened by order of November 27, 1963, to specifically extend coverage to drawings and plans relating to elevators and spreaders.

On October 30, 1963, Hampton, pursuant to the court's orders, turned over 128 blue prints and plans and in December turned over 494 additional blue prints and plans for which he received receipts. Such turn overs included 622 items.

On December 11, 1963, Blair filed the petition in the reorganization court giving rise to the order appealed from. It asserted that Hampton failed to comply with the turn over and restraining orders of October 23 and November 27, 1963, and further alleged that copies above the 967 copies made by Standard were made by Hampton or at its direction and that Hampton is continuing to make use of such copies in its manufacturing activities in violation of the prior orders. Blair asked that compliance with the prior orders be enforced and that Hampton be enjoined from the production of any items, components or parts, for feeder wagons, elevators or spreaders which were interchangeable with similar items covered by the blue prints, drawings and tracings which had been wrongfully obtained. A show cause order was issued. Hampton filed pleading challenging the court's jurisdiction, which issue the court reserved for final hearing. Hampton filed answer denying all allegations made. Hearing was held on July 29 and 30, 1964. On March 24, 1966, the court filed findings of fact and judgment entry. On the jurisdiction issue, the court found:

> "(a) That this Court has jurisdiction over the respective parties and the subject matter of this proceeding, and that this Court, during and immediately after the sale of the assets of the corporate debtor, Kelly Ryan Equipment Company, and as an important act of the reorganization proceeding, possesses jurisdictional authority, as an incident to that proceeding and that sale, by injunctive decree, effectively to assure to petitioner herein its contemplated acquisition of the property so sold to it, and that this jurisdiction is part of the Court's summary jurisdiction in this bankruptcy proceeding."

The court generally and specifically resolved all disputed fact issues in favor of Blair and against Hampton. It again ordered the surrender of all blue prints, drawings and tracings and copies thereof. Section 1 of the court's order which contains the above matter is not attacked or challenged upon this appeal nor are the prior orders of the court directing turn over and restraining use.

The vital issue presented by this appeal is the validity of the injunctive provisions of the final order as contained in the paragraph quoted supra.

The attack upon the injunction is based upon two grounds to wit: (1) The bankruptcy court was without jurisdiction to summarily grant the permanent injunctive relief prayed for. (2) Manufactured products such as those here involved which are not protected by patent are in the public domain and may be copied by those wishing to do so, and hence the permanent injunction prohibiting copying goes too far.

We hold the District Court as the bankruptcy court in which the reorganization proceedings were pending has ancillary jurisdiction to consider the "Petition to Modify Amended Order Entered Herein and to Direct Compliance with said Amended Order" filed December 11, 1963. The petition sets out violations by Hampton of the court's prior orders and asserts that Hampton gained benefits to which he was not entitled by using the plans and drawings in violation of the prior orders. Blair sought enforcement of the prior orders and prayed for the broad injunction which the court subsequently granted and sought general equitable relief.

Courts of bankruptcy constituted by §§ 1 and 2 of the Bankruptcy Act are vested "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act."

> "That a federal court of equity has jurisdiction of a bill ancillary to any original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled. . . . And this, irrespective of whether the court would have jurisdiction if the proceeding were an original one. The proceeding being ancillary and dependent, the jurisdiction of the court follows that of the original cause, and may be maintained without regard to the citizenship of the parties or the amount involved, and notwithstanding the provisions of § 265 of the Judicial Code. . . ." *Local Loan Co. v. Hunt*, 292 U.S. 234, 239.

As pointed out in the case just cited, it does not necessarily follow from the fact that the court has jurisdiction that it is bound to exercise its discretion in favor of granting the relief prayed.

Moreover, if contrary to what we have heretofore held plenary jurisdiction is involved, it is clear that the reorganization court possesses plenary jurisdiction under the circumstances of this case.

In *Duda v. Sterling Mfg. Co.*, 8 Cir., 178 F. 2d 428, 434-35, this court held:

> "But it is now settled that section 102 of the Bankruptcy Act, 11 U. S. C. A. § 502, which provides that section 23 of the Act shall not apply in reorganization proceedings, frees the plenary jurisdiction of the reorganization court from the limitation placed upon the plenary jurisdiction of the bankruptcy court in ordinary bankruptcy. Accordingly, the reorganization court had plenary jurisdiction of the proceedings. . . ."

Such decision is fully supported by *Williams v. Austrian*, 331 U. S. 642, 661. All parties were afforded a full, fair and complete hearing in the bankruptcy court.

We agree with Hampton's second point, which is that the injunction is too broad. It is undisputed that the feeder wagons, elevators and spreaders manufactured by Kelly Ryan and the component parts thereof are not protected by any valid patent. In *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U. S. 225, the District Court had determined that Sears by making and selling a pole lamp, "a substantially exact copy" of Stiffel's pole lamp, was guilty of unfair competition under Illinois law and enjoined the manufacture and sale thereof and ordered an accounting to fix damages flowing from the unfair competition. The Court of Appeals affirmed. The Supreme Court reversed. The Court discusses the objectives of the federal patent laws, noted that patents are a monopoly and are authorized only to reward inventive genius, and that in order to entitle a person to obtain the benefit of a patent monopoly, the patent laws must be strictly observed. Among other things, the Court states:

> " 'Sharing in the goodwill of an article unprotected by patent or trade-mark is the exercise of a right possessed by all—and in the free exercise of which the consuming public is deeply interested.' *Kellogg Co. v. National Biscuit Co.,* supra, 305 U. S., at 122. To allow a State by use of its law of unfair competition to prevent the copying of an article which represents too slight an advance to be patented would be to permit the State to block off from the public something which federal law has said belongs to the public. . . .
>
> "But mere inability of the public to tell two identical articles apart is not enough to support an injunction against copying or an award of damages for copying that which the federal patent laws permit to be copied." 376 U. S. 225, 231-32.

To like effect see *Compco Corp. v. Day-Brite Lighting, Inc.,* 376 U. S. 234.

The reasoning of *Sears* and *Day-Brite* and the holdings therein compels the holding here that Hampton cannot be permanently enjoined from duplicating or copying Kelly Ryan unpatented implements. Hampton's conduct in his surreptitiously obtaining possession and copying the blue prints and drawings of Kelly Ryan and its failure to obey the orders of the court to turn over such documents and not use them is indefensible and warrants the fashioning of appropriate equitable relief. While a fact dispute exists, substantial evidentiary support exists for the court's finding that Hampton retained some copies of the blue prints and drawings and made use thereof in manufacturing feeder wagons substantially the same as those manufactured by Kelly Ryan. Such use of the plans accelerated the time in which Hampton was able to produce the wagons. Hampton had possession of a Kelly Ryan feeder wagon and it seems clear from the evidence that it would be possible in the course of time for mechanics skilled in the field to draw necessary plans for the parts needed to construct the feeder wagons and to build such a wagon from the available model. It is difficult to say just how much time the use of the plans accelerated the production.

We believe that under the facts here the court would have been justified in restraining the production of substantially similar implements for the period that would have been required to reproduce such items without the aid of the plans.

The wrongful acts here occurred in the fall of 1963. The order appealed from was not entered until March 24, 1966. We have no doubt whatever that it would have been possible for mechanics with ordinary skill in the field to have made Hampton wagons substantially identical to the Kelly Ryan wagons without the use of the blue prints long before 1966 and hence no purpose would be served in remanding this case for further fact findings looking toward granting injunctive relief for the period that would be required to reproduce the wagons without the wrongful use of the plans.

Additionally, the injunction proscribes the production of any part of any implement which is interchangeable with a part of the Kelly Ryan equipment. Such broad language would prohibit the use of much ordinary and uncomplicated stock equipment such as wheels, axles, frames, flooring and siding.

Blair argues that there has been a palming off of Hampton's products as those of Blair. Such issue is not fairly raised in the pleadings and even if raised, such an issue of unfair competition would not fairly fall within the summary jurisdiction of the bankruptcy court.

The record shows the issue of some contempt of court orders. No contempt issues are before us on this appeal.

Our present decision is strictly limited to our holding that the broad provisions of paragraph 2 of the order for injunction heretofore quoted in full enjoining production of implements similar to those of Kelly Ryan are invalid.

The order appealed from is modified by striking therefrom all of paragraph 2 of said order and the portion of the order contained in paragraph 2 is vacated.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Filed March 10, 1965

In the matter of
KELLY RYAN EQUIPMENT COMPANY,
Debtor
BLAIR MANUFACTURING COMPANY,
Petitioner,
vs.
EMMETT HAMPTON, and HAMPTON DISTRIBUTING COMPANY,
Respondents.

MEMORANDUM

APPEARANCES: For the Petitioner, Lyle E. Strom, Esq. and Charles A. Schorr, Esq. (Fitzgerald, Brown, Leahy, McGill & Strom), of Omaha, Nebraska;
For the Respondents, John J. Hanley, Esq. and Clayton H. Shrout, Esq. (Shrout, Hanley, Nestle & Corrigan), of Omaha, Nebraska.

DELEHANT, Senior District Judge

The articles of incorporation of Kelly Ryan Equipment Company were filed in the office of the Secretary of

State of Nebraska on March 25, 1947. That date may, therefore, be treated as the inception of its corporate existence. Its principal place of business was at Blair, in Washington County, Nebraska, a small "county seat" community located some twenty-six miles by public highway, northwesterly from the City of Omaha. Its declared and actual business consisted of the manufacturing and marketing of farm implements and equipment, and of other wood and metal products. In its corporate capacity, it engaged in that enterprise from its incorporation until the early weeks of 1955.[1]

On February 8, 1955, Kelly Ryan Equipment Company, being largely indebted, and undercapitalized, and unable to pay its debts as they matured, filed in this proceeding in this court its petition as the debtor, under Chapter X of the National Bankruptcy Act, as amended, for the corporate reorganization of Kelly Ryan Equipment Company under Title 11, U. S. C., Sections 501 et seq. On the same day, an order of this court, speaking through the Honorable J. A. Donohoe, its then Chief Judge, was made and entered approving such petition, appointing Reed O'Hanlon, Sr., an attorney at law of Blair, Nebraska, and of the bar of this court, as the trustee of the estate of the debtor, fixing the amount of the trustee's bond, prescribing his duties and authority, making sundry protective provisions, and generally embarking upon the project of the desired corporate reorganization of the debtor, as contemplated in the cited statute, and prayed in the petition. The trustee thus appointed took his oath on February 8, 1955, and filed his trustee's bond on February 9, 1955. Reed O'Hanlon, Sr., has since been and is the duly appointed and qualified trustee of the debtor in this case.

In the intervening period of over eleven years, the business of the debtor was conducted by the trustee in pursuance of the orders of this court.[2] Numerous orders of this court pertinent to the trustee's operation of such business, or looking to the possible reorganization of the corporate debtor, or otherwise arising out of this proceeding, were made and entered which, for want of present relevance, need not, and will not, be reflected or mentioned in this memorandum. Many claims have been presented, whose aggregate amount is relatively large. A trustee's second amended plan of reorganization was approved by the court (filing 455) and, after submission to creditors and the canvassing of their positions with respect thereto, was confirmed by the court (filing 479). But in consequence of the determined impossibility of financing such plan (filing 594), it has not been consummated.

From time to time during the proceeding, the position was advanced by some of the parties involved in the litigation that the reorganization of Kelly Ryan Equipment Company in this case was impossible and not feasible. On September 7, 1962, Sidles Company, as a substantial creditor, both secured and unsecured, filed herein a petition for an order, under Section 236(2) of the Bankruptcy Act, that the debtor be adjudged a bankrupt, and bankruptcy be proceeded with, or that this proceeding be dismissed, Title 11 U. S. C., Section 636(2) (filing 538). On the day of its filing, an order to show cause responsive to such petition, returnable on October 3, 1962, was made and entered, and service thereof was made as required by the order (filing 539). By sundry successive orders, the hearing on such petition was adjourned from time to time. Those orders culminated in an order setting such hearing, as well as hearing on separate comparable petitions by the United States of America and Midwest Steel Corporation, two other creditors, for August 1, 1963 at 10:00 o'clock A. M. (filing 590). That hearing was not actually held. It appears to have been obviated by the developments next herein related.

Meanwhile, by order dated January 7, 1963, filed January 21, 1963 (filing 560), responsive to an application of the trustee filed with such order, the court had directed that the trustee be:

> "authorized to investigate and negotiate for the possible sale of the above named debtor corporation or its assets, as a going concern free and clear of lien, and to retain business brokers upon commission, all subject to the approval of the court and any other approvals that may be required by the Act of Congress Relating to Bankruptcy."

Thereafter, investigation and negotiation to the end contemplated in that order were pursued, largely without detailed report to, or participation by, the court, or the preservation of any judicial record of that activity, or its progress or prospects. It is to be remembered that the order of this court, *supra*, authorizing the trustee to investigate and negotiate touching the possible sale of the assets of the trust was entered some four months after the filing of the motion of Sidles Company lately mentioned. And the other like petitions seeking liquidation already adverted to were filed, and remained pending, during the suspension of final submission of the Sidles Company petition.

During the month of August, 1963, the trustee obtained two written offers from different parties to purchase by far the greater part of the assets of the debtor, Kelly Ryan Equipment Company. Of those offers one, bearing date August 6, 1963, was made by one Emil R. Sokol of Columbus, Nebraska, the other, bearing date August 2, 1963, was made jointly by Simon Korshoj, Jay L. Kear, Hampton Distributing Company and Emmett Hampton, but it was also supplemented by a written "amendment", bearing date August 16, 1963. The two written instruments last mentioned are to be considered together as a single offer, for that is their eventual significance.

On September 4, 1963, Reed O'Hanlon, Sr., trustee, filed herein a pleading entitled, PETITION FOR AUTHORIZATION TO SELL PORTIONS OF DEBTOR'S PROPERTY FREE AND CLEAR OF LIEN AND TO FIX THE TIME AND PLACE OF HEARING THEREON (filing 594), attached to and incorporated in which are the two original written offers mentioned in the immediately preceding paragraph, including the amendment, dated August 16, 1963, of the offer of August 2, 1963. Without purposeless detail, after a preamble fairly reciting its filing and contents, it is observed that such PETITION reported and recalled the failure, and impossibility, to consummate the theretofore confirmed reorganization plan, *supra;* the court's earlier approval of efforts by the trustee to procure offers for the debtor's property and assets, *supra;* and the trustee's activity in that direction; advised the court of his procurement and possession of the two offers (including the supplementation of one of them), and of their attachment to, and incorporation in, the PETITION, *supra;* advanced the position that the acceptance of the best negotiated offer for the debtor's assets was in the best interest of his trust; and prayed for:

> "the order of court setting a time and place for hearing, and directing the manner and form of notice of the said hearing if notice thereof be required and ordered by the court, to consider the offers to purchase the property described herein, and any other offers that may be forthcoming, authorizing petitioner 'to sell the property' described in the offer accepted, free and clear of lien and encumbrance, and to accept and hold payment therefor subject to the further orders of the court as to disposition of it and the nature and extent of liens and encumbrances thereupon."[3]

Also on September 4, 1963, an order of this court (filing 595) was duly made and given, wherein and whereby it was:

> "ORDERED that September 19, 1963, at 9:30 o'clock A. M., in Court Room No. 2 in the United States Court House in Omaha, Nebraska, shall be the date and time and place for hearing upon the said petition and notice thereof shall be given in writing to all creditors and stockholders and attorneys of record in this proceedings (sic) by regular United States mail, postage prepaid, mailed at least 10 days prior to the said date of hearing."

Service of that order was timely made in accordance with its directions.

On September 18, 1963, Blair Manufacturing Company filed herein its OFFER TO PURCHASE ASSETS OF THE DEBTOR, in writing (filing 597), wherein it set out at length a brief but comprehensible description of the assets of the debtor by it proposed to be purchased; the amount, and times of the proposed payment, of its offer therefor, and the conditions of the offer. It readily appears that such filing was made on the day prior to the date set for hearing on the trustee's PETITION.

At the time and place prescribed in the order of September 4, 1963, *supra,* hearing was had in open court pursuant to that order. It was largely attended, as the order thus entered (filing 600) discloses in detail, and for the purposes of this ruling, especially by counsel for, or other representatives of, the present petitioner and respondents. And as the result of, and during such hearing, and as of September 19, 1963, the court made and entered judgment of which the formal written and signed entry was filed on September 20, 1963 (filing 600).[4] From that judgment, the following decretal language is quoted:

> "IT IS THEREFORE ORDERED that Reed O'Hanlon, Sr., trustee of the above named debtor corporation, has accepted, subject to the approval of the court, the offer of Blair Manufacturing Company, as amended by stipulation in open court, to purchase the assets therein named for the price and upon the terms and conditions therein set forth and acceptance of the offer by him hereby is authorized and approved; the said trustee hereby is authorized to sell to Blair Manufacturing Company, free and clear of all liens and encumbrances, all of the assets of Kelly Ryan Equipment Company, the above named debtor corporation, of every kind, type and description, real, personal and mixed, tangible and intangible, and wherever located, including all stock-piled and consigned items and any other items in the hands of others than the debtor, the corporate name, all lease and contract rights, and the approximately two acre piece of supporting real estate at the River Plant of the above named debtor, title to which is now in Nebraska-Iowa Bridge Company, but

excluding from the assets to be purchased: (1) the real estate commonly referred to as Plant No. 1, legally described as Lots 3 to 12, inclusive, Block 36, Original Town of Blair, Nebraska, (2) the buildings owned by debtor on ground leased from Chicago & Northwestern Railway Company, commonly referred to as Plant No. 2, located on Front Street in Blair, Nebraska, (3) cash on hand and on deposit, (4) Fifty elevators and the account receivable therefor manufactured to the order of Hampton Distributing Company, (5) all other accounts receivable in a sum not to exceed the sum of $5,000.00 for sales made or services rendered prior to the date hereof, and (6) parts of the approximate value of $1,000.00 which are the property of Hampton Distributing Company stored upon the premises of the above named debtor corporation, for the total purchase price of $300,000.00, to be paid by Blair Manufacturing Company as follows: $30,000.00 paid by certified check now deposited with the Clerk of the District Court of United States for the District of Nebraska in Omaha, Nebraska, $20,000.00 by certified check to be paid on or before thirty (30) days from the date hereof, $30,000.00 by certified check to be paid on or before sixty (60) days from the date hereof, and the balance of $220,000.00 by certified check to be paid on or before ninety (90) days from the date hereof, subject to the terms and conditions, and forfeiture provisions contained in the said offer of Blair Manufacturing Company, as amended, and the said trustee hereby is authorized to do all things necessary to be done by him to consummate the said sale.

"IT IS FURTHER ORDERED that, upon payment to him of all sums of money to be paid by Blair Manufacturing Company as above set forth, the said trustee shall consummate the sale of the property above set forth and shall make, execute and deliver all legal instruments of whatever character necessary to transfer good and sufficient marketable title to all of the

> said property to Blair Manufacturing Company or to its nominee, and shall deliver possession of all of the said property to Blair Manufacturing Company or to its nominee.
>
> "IT IS FURTHER ORDERED that all liens and encumbrances which are in force and effect against the property to be conveyed to Blair Manufacturing Company or its nominee shall attach to and follow the proceeds from the aforesaid sale with the same force and effect as they now attach to the property and assets.
>
> "IT IS FURTHER ORDERED that the earnest money deposits made by persons whose offers to purchase were rejected shall be returned to them."

The reference in the concluding paragraph of the order to "persons whose offers to purchase were rejected" was and is to Emil R. Sokol and to Simon Korshoj, Jay L. Kear, Hampton Distributing Company and Emmett Hampton, whose offers were rejected. Earlier in the judgment, and by its paragraph numbered 7, it was adjudged that:

> "7. The two other offers to purchase, made by persons and corporations other than Blair Manufacturing Company, are rejected and the trustee should be authorized to return the earnest money deposits accompanying the rejected offers to the persons who made the deposits."

For the property whose sale was so approved by the court, Blair Manufacturing Company agreed, and, by the immediately foregoing order was required, to pay by means of certified checks, the total purchase price of $300,000.00 in installments and at times as follows:

$30,000.00 deposited with the clerk of this court at the time of approval of the sale;

$20,000.00	on or before thirty days after September 20, 1963;[4]
$30,000.00	on or before sixty days after September 20, 1963; and,[4]
$220,000.00	on or before ninety days after September 20, 1963.[4]

On September 25, 1963, therefore, only five days after the filing of the court's Order approving the sale, *supra,* the trustee and the purchaser joined in, and filed herein, a PETITION (filing 602) for the authorization by the court of the surrender by the trustee to the purchaser of the possession of the property covered by the sale, upon accelerated payment forthwith by Blair Manufacturing Company of the sum of $50,000.00, representing the installments of $20,000.00 and $30,000.00 by it, under the court's order approving the sale, to be paid respectively on or before thirty days and sixty days after September 20, 1963, on condition that title to all of the said assets should remain in, and be the property of, Kelly Ryan Equipment Company, until payment in full of the additional sum of $220,000.00 due, *supra,* on or before ninety days after September 20, 1963, and with certain other presently irrelevant precautions protective of the trustee's interests. Also on September 25, 1963, the court, by order (filing 603) granted the authority thus requested. And, on September 26, 1963, the purchaser having meanwhile made that accelerated payment of $50,000.00, the trustee turned over the possession of the assets so sold to Blair Manufacturing Company, as well as of certain parcels of property not thus sold but to be delivered temporarily to Blair Manufacturing Company. See REPORT AND RECEIPT (filing 604).

On December 18, 1963, the trustee filed herein his PETITION (filing 637) showing that theretofore, and on December 17, 1963, the then unpaid balance upon the purchase price under the theretofore approved sale had been paid in full, and praying for an adjudication that such sale had been consummated, and for the final approval thereof. Also on December 18, 1963, the court, upon the petition just mentioned, made and entered an order (filing 638) adjudging that such sale had been consummated, and finally approving such sale, and the consummation thereof.

By way of a brief description, and from the order of this court dated September 19, 1963, and filed September 20, 1963 (filing 600), and already quoted herein, it is now mentioned that the property and rights of Kelly Ryan Equipment Company, and of the trust under the administration herein of this court, so sold and conveyed to Blair Manufacturing Company, include:

> "All of the assets of Kelly Ryan Equipment Company, the above named debtor corporation, of every kind, type and description, real, personal and mixed, tangible and intangible, and wherever located, including all stock-piled and consigned items and any other items in the hands of others than the debtor, the corporate name, all lease and contract rights, and the approximately two acre piece of supporting real estate at the River Plant of the above named debtor, title to which is now in Nebraska-Iowa Bridge Company, but excluding from the assets to be purchased:
>
> > "(1) the real estate commonly referred to as Plant No. 1, legally described as Lots 3 to 12, inclusive, Block 36, Original Town of Blair, Nebraska, (2) the buildings owned by debtor on ground leased from Chicago and Northwestern

> Railway Company, commonly referred to as Plant No. 2, located on Front Street in Blair, Nebraska, (3) cash on hand and on deposit, (4) Fifty elevators and the account receivable therefor manufactured to the order of Hampton Distributing Company, (5) all other accounts receivable in a sum not to exceed the sum of $5,000.00 for sales made or services rendered prior to the date hereof, and (6) parts of the approximate value of $1,000.00 which are the property of Hampton Distributing Company stored upon the premises of the above named debtor corporation."

But, on October 10, 1963, therefore, only two weeks after the provisional and conditional surrender, *supra,* to Blair Manufacturing Company, as purchaser of the possession of the assets to it sold, as already recited herein, and two months and eight days before the filing of the trustee's petition declaring, and the entry of the court's order adjudging and approving, the consummation of the trustee's sale to Blair Manufacturing Company, the purchaser, Blair Manufacturing Company, as petitioner, filed in this proceeding a PETITION (filing 606) against Emmett Hampton, and Hampton Enterprises,[5] and Hampton Distributing Company, as respondents.[5] The petition thus filed alleged that among the assets of the debtor corporation sold to the petitioner, *supra,* "were blueprints, drawings and tracings pertaining to feed wagons and feed wagon parts manufactured by the debtor corporation; that those blueprints, drawings and tracings were taken from the debtor's premises without authority; that copies thereof were made or caused to be made by respondents; and that said blueprints, drawings, tracings and copies thereof" were at the time of the filing of the petition, "in the possession and under the control of respondents"; that such blueprints, drawings, tracings and copies then were the property of the estate involved in the reorganization proceeding, and their possession or control by respondents, or by persons or entities directly or indirectly controlled by respondents, would result in petitioner's failure to receive all of the assets embraced within its purchase; and that petitioner had reason to believe that respondents, or persons or entities under their direction or control, were then using and would continue to use such blueprints, drawings, tracings and copies thereof, and that unless such use were restrained, imminent damage would result to the debtor's estate, its creditors and the petitioner; and that petitioner had the right to the immediate possession and control of all of such blueprints, drawings, tracings and copies thereof. And in the petition, the petitioner prayed that respondents be directed forthwith to surrender all of such blueprints, drawings, tracings, and copies thereof, to petitioner; that pending the hearing and determination of the petition, respondents be restrained from in any way using them, or making use thereof, or causing the same to be used, by persons or entities directly or indirectly under their control, and for general equitable relief. Also on October 10, 1963, an order to show cause why the foregoing prayer of that petition should not be granted, with an order for temporary stay, was made and entered by the court, returnable on October 22, 1963 at 9:30 o'clock, A. M., and a restraining order pending hearing, as prayed, *supra*, was granted (filing 607). Timely service thereof was made on the respondents. The respondents answered on October 18, 1963 (filing 610), denying all averments of the petition except its allegation of the entry of this court's order of September 19, 1963, filed September 20, 1963, *supra*.

On the issues thus made between petitioner and respondents, trial in open court was had on October 22 and 23, 1963; and on October 23, 1963, an order and decree was made and entered (filing 619, dated October 23, 1963, filed October 30, 1963) dismissing the petition as to Hampton Enterprises; declaring the court's possession of jurisdiction; finding factually (a) that the blueprints, drawings and tracings pertaining to feed wagon and feed-wagon parts were property of the debtor; (b) that such items "were taken from the debtor's premises without authority by respondents, who caused copies to be made"; (c) that the withholding of such blueprints, drawings and tracings, and copies thereof, by respondents would prevent petitioner from receiving in full the property of the debtor, which it had contracted to purchase; (d) that respondents intended to use such blueprints, drawings, tracings, and copies thereof, for their own benefit; (e) that petitioner had the right to possession and control of such blueprints, drawings, tracings and all copies thereof; (f) that continued possession of such blueprints, drawings, tracings, and copies thereof, by respondents would result in this court and its trustee being unable to carry into effect the court's order for the sale of debtor's assets; and (g) that the prayer of the petition should be granted; and adjudging and decreeing that respondents, and each of them, their agents, servants and employees surrender forthwith to petitioner the possession of all said blueprints, drawings and tracings, and all copies thereof made at the behest or through the procurement of respondents, or either of them, and that the respondents, and each of them, and the agents, servants and employees of the respondents, and each or either of them, be restrained and enjoined from the use, or making use, of such blueprints, drawings and tracings, or copies thereof, and from causing the same, or any of them, to be used by any entity or entities directly or indirectly under their control or the control of either of them; and assessing the costs of that subordinate proceeding against the respondents, and each of them.

On October 30, 1963, there was filed herein the receipt of counsel for the petitioner (filing 620) for a large number of "Blueprints" (each identified by a separate number), said in such receipt to have been "surrendered to plaintiff by respondent (sic) per order of the court." The receipt was for the identified Blueprints only, and was not a general receipt.

On November 27, 1963, the petitioner and the respondents filed herein a stipulation (filing 623), in which they joined, wherein they stipulated and agreed, in language carefully chosen, first, that the petitioner's petition (i. e. filing 606, *supra*) be so amended as to allege that the blueprints, drawings and tracings therein mentioned, that were among the assets covered by the sale to the petitioner, were "blueprints, drawings and tracings pertaining to feed wagons, elevators, manure spreaders and parts for the same manufactured by the debtor corporation", rather than only to "blueprints, drawings and tracings pertaining to feed wagons and feed-wagon parts manufactured by the debtor corporation", secondly, that the court's order of October 23, 1963 (filing 619), *supra*, be amended both in its preamble, and in its factual findings numbered III in such manner as to make identical amplification of the pertinence of the "blueprints, drawings and tracings" involved, and thirdly that, by consent of the litigating parties, the court might enter an Amended Order to make the changes in filing 619 thus agreed upon. And, in pursuance of that stipulation, the court on November 27, 1963, made, entered and caused to be filed (filing 624) an Amended Order, speaking, however, as of October 23, 1963, making the changes thus defined in the stipulation, *supra.*

Now, to the pleading which directly initiated the trial and submission upon which ruling is herein announced. It is a PETITION TO MODIFY AMENDED ORDER ENTERED HEREIN AND TO DIRECT COMPLIANCE WITH SAID AMENDED ORDER, filed by petitioner on December 11, 1963 (filing 626). By that PETITION TO MODIFY, petitioner alleged the entry of this court's order of October 23, 1963 (filing 619); the directions of that order requiring that the respondents forthwith surrender to petitioner the possession of all blueprints, drawings and tracings of the debtor pertaining to feed wagons and feed-wagon parts, and all copies thereof made at the behest or through the procurement of respondents, or either of them, and restraining and enjoining the respondents, and each of them, and the agents, servants and employees of the respondents, and each or either of them, from the use, or making use, of such blueprints, drawings, tracings or copies thereof, and from causing the same, or any of them, to be used by any person or persons, or entity or entities, directly or indirectly under their control, or the control of either of them, and the ostensible surrender on October 30, 1963, of such blueprints, drawings, tracings, and copies thereof, but with the explicit allegation "that such turnover on October 30, 1963, did not comply with said order of the court, in that respondents retained possession of blueprints, drawings, tracings, or copies thereof, pertaining to feed wagons and feed-wagon parts." The petitioner, in such petition, then averred the stipulation, and corrective amendment of the foregoing order, both dated November 27, 1963 (filings 625 and 626), and asserted that in ostensible compliance with such amended order, the respondents on December 7, 1963, purportedly turned over to petitioner the possession of all of said blueprints, drawings, and tracings, and all copies thereof, and, on that date petitioner, by its counsel, executed a receipt for the items so turned over, included within which items were blueprints, drawings and tracings, or copies thereof, pertaining to vital and important component parts of feed wagons and feed-wagon parts manufactured by debtor corporation. The petitioner then alleged, upon information and belief, that respondents had failed to comply with the order and amended order of the court thus earlier in its Petition to Modify identified; that, despite such order and amended order, the respondents, and their agents, servants and employees, at the time of the tender of said Petition to Modify had, and were continuing to use, and make use of, blueprints, drawings, and tracings belonging to the debtor corporation, or were using and making use of copies thereof. And, finally and positively, petitioner, in the Petition to Modify, alleged that respondents, and their agents, servants and employees had, and were continuing to use, and make use of, information and data obtained by them while such blueprints, drawings and tracings, and copies thereof, were wrongfully in their possession; and also that because of the failure of respondents fully to comply with this court's order (filing 619), and amended order (filing 624), and because of the information obtained by the respondents, their agents, servants and employees, while they wrongfully held possession of such blueprints, drawings and tracings, and copies thereof, petitioner could not receive in full the benefit for which it bargained in contracting to purchase the assets of the debtor corporation, unless the respondents, and each of them, and the agents, servants and employees of the respondents, and each or either of them, be restrained and enjoined from the production of any items, components and parts for feed wagons, elevators and spreaders which are interchangeable with the items, components and parts for feed wagons, elevators and spreaders covered by said blueprints, drawings, tracings, and copies thereof.

And the prayer of that pleading is copied thus:

> "that said respondents be directed forthwith to surrender possession of all blueprints, drawings, tracings and copies thereof not heretofore surrendered to petitioner; that the amended order of the Court entered herein be modified to restrain and enjoin said respondents and each of them and the agents, servants and employees of said respondents and each or either of them from the production of any items, components and parts for feed wagons, elevators and spreaders which are interchangeable with the items, components and parts for feed wagons, elevators and spreaders covered by blueprints, drawings and tracings and copies thereof, of Kelly Ryan Equipment Company, debtor; and that petitioner have such other and further relief as is just."

On December 11, 1963, i. e., on the filing of petitioner's

Petition to Modify (filing 626), the court made and entered an order to show cause (filing 627) against the demand of that pleading (filing 626), before this court on December 16, 1963, at 9:30 o'clock A. M., and such order was served as directed therein. On December 13, 1963, the respondents filed herein a motion for continuance of the hearing contemplated by that Order to Show Cause (filing 630). On the same day there was filed an undated receipt of one of petitioner's counsel for many blueprints, each designated by a descriptive number. Also on December 13, 1963, hearing was had upon the foregoing motion for continuance, and an order was made and given (which was filed on December 16, 1963) (filing 635), sustaining such motion, and continuing the hearing to December 27, 1963, at 9:30 o'clock A. M., and requiring and ordering the respondents to make their responsive pleading to petitioner's Petition to Modify, at or before 2:00 o'clock P. M. on December 16, 1963.

On December 16, 1963, and prior to their tender of their showing of cause responsive to the order to show cause (filing 627), the respondents served and filed herein a pleading by them denominated, MOTION TO DISMISS (filing 636) wherein they prayed for the "dismissal" of that portion of petitioner's PETITION TO MODIFY (filing 626), wherein the petitioner demanded the restraint and injunction of the respondents, and those in concert with them, "from the production of any items, components and parts for feed wagons, elevators and spreaders which are interchangeable with the items, components and parts for feed wagons, elevators and spreaders covered by the blueprints, drawings and tracings and copies thereof, of Kelly Ryan Equipment Company, debtor," "for the reason that said portion of said prayer was not part of the original issues in this case as raised by the pleadings, and was not in any way the subject of any previous order or amended order heretofore entered by the court herein." On February 5, 1964, the court made and entered its Order (filing 646) denying and overruling that MOTION TO DISMISS, but with the reservation of the authority to determine and rule upon the issue of jurisdiction, and upon the ground for dismissal specified in the motion, *supra*, in the final determination upon the then pending petition to modify of the petitioner. That order of the court was accompanied by a concurrently filed memorandum (filing 645), wherein the court explained the background and basis of, and the controlling reason for, the order. Without repetition of, or detailed quotation from, that order and memorandum, they are now incorporated by reference into this memorandum.

On March 2, 1964, the respondents, Emmett Hampton and Hampton Distributing Company,[6] filed their ANSWER (filing 654) by way of response to the Order to Show Cause. In and by their answer, briefly summarized, the respondents, I. denied their failure to surrender to petitioner the possession of all blueprints, drawings and tracings of debtor corporation pertaining to feed wagons and feed-wagon parts, and all copies thereof, made at the behest, or through the procurement, of respondents or either of them, and asserted their possession of receipts showing such surrender on or about October 30, 1963; II. alleged that any blueprints, drawings and tracings of debtor corporation pertaining to elevators and spreaders manufactured by the debtor corporation, and all copies thereof made at the behest, or through the procurement, of respondents, or either of them, have been surrendered to the attorney for the debtor corporation,[7] whose receipt allegedly shows such surrender to have been made on or about October 30, 1963; III. denied that, at the time of making the answer, they were using, or continuing to use, or make use of, any blueprints, drawings or tracings belonging to the debtor corporation in connection with the manufacture of any product or products; and IV. alleged that petitioner's petition to modify "appears to infer" that respondents, and each of them, were wrongfully making use of business or trade secrets in which the debtor corporation had a property right, which inference the respondents denied; alleged that the feed wagon which the respondents were then manufacturing was being manufactured from their own blueprints and drawings, and was not a duplicate of the feed wagon of the debtor corporation, but, on the contrary, differed from the feed wagon of the debtor corporation "on a major basis" (which basis is not otherwise specified or particularized). And the pleading concluded with a prayer for dismissal of petitioner's PETITION TO MODIFY and "for such other and further relief as is just."

On March 24, 1964, the respondents served and filed a motion for summary judgment (filing 664) on the asserted ground of the absence of any genuine issue of material fact, and of the respondents' asserted entitlement to judgment as a matter of law. The motion was not submitted or called or set for submission until the time fixed for the opening of the trial of the issues on their merits on July 29, 1964, at 9:30 o'clock A. M. It was submitted then, and, by order (filing 710), the court denied and overruled the motion, subject to the reservation to the court of the authority to determine and rule upon the grounds assigned in such motion, in and as a part of the court's determination of, and ruling upon, the issues made by the pleadings, as the same should be disclosed in the trial then about to open, for which a formal setting had been made.

Trial of the issues thus made between the petitioner, on the one hand, and, on the other hand, the respondents, was held in open court, without a jury,[8] on July 29 and 30, 1964. Thereafter extended briefs of counsel were submitted to the court. The controversies between the litigants are few, but have been vigorously presented.

Confronting the court at the outset is the denial in behalf of the respondents of the possession by this court, and in this proceeding, of jurisdiction over the present litigation between the petitioner and the respondents. Supportive of that denial, respondents insist that the demand against them presently made by petitioner may not summarily be presented as an ancillary, or subsidiary, aspect of this long pending proceeding, but may be asserted, if at all, only in a plenary suit against them, in which, as they contend, they would have the right to a trial by jury. And they appear to deny that such a suit could be brought in this court. For no attempt is, or could appropriately be, made in the circumstances to vindicate a patent monopoly.[9] And diversity jurisdiction under Title 28 U. S. C., Section 1332(a) is not asserted, and does not exist.[10]

The jurisdictional issue thus arising has to be determined in the light of the procedural history in this case, which has already been recalled in substantial detail, and will not now be either repeated or synopsized. The question is whether this court, during and immediately after the sale of the assets of the corporate debtor heretofore identified herein, in, and as an important act of, the reorganization proceeding, possesses the jurisdictional authority, as an incident to that proceeding and that sale, by injunctive decree, effectively to assure to the purchaser (petitioner herein) its contemplated acquisition of the property so sold to it. The court concludes that its requisite jurisdiction exists, and rejects the respondents' several challenges to it as tendered from time to time since the service and filing of the petition to modify. Much authoritative legal literature supports that view. Brief reference to it follows, though without unneeded quotation. Shortly stated, jurisdiction in the instant controversy is present because the determination of such controversy is necessary, to the end that this court's orders directing and confirming the sale in the reorganization proceeding, over which its jurisdiction is unquestionable, may be carried into effect, and the purchaser at such sale may obtain and enjoy the property by it therein purchased. Such jurisdiction exists in aid, and for the enforcement, of the judgments and decrees of the national courts generally, whether or not they be functioning as courts of bankruptcy.

Thus, in a suit in equity, and in a subsidiary proceeding brought therein for the enforcement of the decree initially entered, it was said by the United States Court of Appeals, Eighth Circuit, speaking in 1906 through Judge Walter H. Sanborn, in *Brun v. Mann,* (8 Cir.) 151 F. 145, that:

"Nor was the right of the complainant to invoke

> this jurisdiction conditioned by the existence of a federal question or of diversity of citizenship or of the amount in controversy. A bill in equity dependent upon a former action of which the federal court had jurisdiction may be maintained in the absence of either of these attributes (1) to aid, enjoin or regulate the original suit; (2) to restrain, avoid, explain, or enforce the judgment or decree therein; and (3) to enforce or obtain an adjudication of liens upon, or claims to property in the custody of the court in the original suit. Such a dependent suit is but a continuation in a court of equity of the original suit, to the end that more complete justice may be done."

Later, and in 1928, in *St. Louis-SanFrancisco Railroad Company v. Byrnes,* (8 Cir.) 24 F. (2) 66, by the court itself characterized as "an ordinary creditors' bill", the same court, speaking through Judge Kenyon (with the concurrence of District Judge Thomas C. Munger, then a judge of this court), reversed a judgment of the district court dismissing for supposed want of jurisdiction a petition in intervention in the creditors' bill proceeding, wherein the petitioner claimed title to certain material theretofore sold by the court appointed receiver at the court's direction and with its confirmation. And the appellate court declared the trial court's jurisdiction over the petition in intervention as a dependent proceeding in the creditor's bill case. In its ruling, the court quoted and reiterated its language above excerpted from *Brun v. Mann, supra.*

Furthermore, in the opinion last cited, the following language was quoted with approval from *Hoffman v. McClelland,* 264 U. S. 552, 558, 44 S. Ct. 407, 409, 68 L. Ed. 845:

> "It is settled that, where in the progress of a suit

> in a federal court property has been drawn into the court's custody and control, third persons claiming interests in or liens upon the property may be permitted to come into that court for the purpose of setting up, protecting, and enforcing their claims, although the court could not consider or adjudicate their claims if it had not impounded the property. Power to deal with such claims is incident to the jurisdiction acquired in the suit wherein the impounding occurs, and may be invoked by a petition to intervene pro intercase suo or by a dependent bill. But in either case the proceeding is purely ancillary.''[11]

It will at once be recognized that the property and rights which the present petitioner claims, and of which it now seeks protection, not only belonged to the debtor's estate in this proceeding, and have been impounded and taken into possession by this court's trustee, but have actually been sold by that trustee at a sale held under the authority, and with the confirmation of, this court, *supra.*

To comparable effect, still without the impact of bankruptcy on the jurisdictional question, see *Cincinnati, Indianapolis and Western Railroad Company v. Indianapolis Union Railway Company et al.,* 270 U. S. 107, 46 S. Ct. 221, 70 L. Ed. 490.

By Title 11 U. S. C., Section 11, courts of bankruptcy generally, and by Title 11 U. S. C., Sections 511, 514 and 515, such courts in the exercise of their powers in corporate reorganization proceedings under Chapter X of the Bankruptcy Act, possess the ancillary or dependent jurisdiction already adverted to. Doubt may well be entertained whether the statutory commitments of jurisdiction just cited were necessary. But, whether necessary or not, they have been provided. At this point reference is made to the exhaustive and perceptive discussion of the present jurisdictional question which appears in *Collier on Bankruptcy*, 14th Edition, Volume 6, at pages 576 to 594, both inclusive. The court refrains from extended quotation from that authority. However, the following brief discussion appearing on pages 579 to 584, both inclusive, of the text is recalled:

> "Inevitably disputes or controversies will arise in the course of the proceedings between the trustee or debtor in possession and others concerning property claimed to be a part of the estate. In ordinary bankruptcy, generally speaking, where the controversy is one concerning property in the actual or constructive possession of the bankruptcy court, the court may adjudicate summarily all rights and claims pertaining thereto. The reorganization court may do likewise. This jurisdiction exists under section 2 a (7) of the Act as well as section 111, together with the inherent right in all courts to protect their possession, and as previously stated is not affected by the provisions of section 23. As to property within its actual or constructive possession, the reorganization court may try questions of title, determine the amount and validity of liens, issue turnover orders, adjudicate petitions of reclamation, and enjoin proceedings that interfere with the administration of the estate, or which are directed towards the debtor's property. Once the debtor acquires possession, the jurisdiction to determine all conflicting claims will remain, and there can be no interference with such possession upon the part of any other court, except by way of review or appeal or by permission of the bankruptcy court that the claim be determined in a nonbankruptcy forum."

The broad jurisdictional authority of the reorganization court over, and for the protection and security of, property of the debtor's estate, within the actual or constructive possession of that court is thus made apparent. And even in instances where the property or asset, in respect of which a claim of title, lien or otherwise, is made, adverse to the debtor or his or its estate, is not in the possession, actual or constructive, of the court, the reorganization court is clothed with the jurisdiction to ascertain and determine whether the claim thus made is ingenuous and substantial, and not merely colorable. And that is true though an affirmative answer to such inquiry pursued by the bankruptcy court entitles the claimant to a plenary suit for the determination of the merits of his claim. *Harrison v. Chamberlin,* 271 U S. 191, 194; 46 S. Ct. 46, 70 L. Ed. 897; *Cline v. Kaplan,* 323 U. S. 97, 99, 65 S. Ct. 155, 89 L. Ed. 97.

The exercise by the bankruptcy court of the summary jurisdiction thus considered to be vested in it, especially in respect of property of a debtor within its actual or constructive possession is notably illustrated in the opinion of the late Chief Judge Parker in *First National Bank in Houston v. Lake,* (4 Cir.) 199 F. (2) 524 (cert. den. 73 S. Ct. 337) wherein he quotes at considerable length from, and relies upon, the textual discussion of *Collier on Bankruptcy, supra.* See also *Local Loan Company v. Hunt,* 292 U. S. 234, 54 S. Ct. 695, 78 L. Ed. 230 (antedating Chapter X, *supra,* and arising in a voluntary bankruptcy proceeding); *Thompson Trustee v. Magnolia Petroleum Company,* 309 U. S. 478, 60 S. Ct. 628, 83 L. Ed. 876); *State Finance Company v. Morrow,* (10 Cir.) 216 F. (2) 676; *In re Muntz TV,* 225 F. (2) 489 (in the circumstances of which the court declared the right of the claimant to a plenary suit, while also acknowledging the governing rule touching procedure herein advanced); *Curtis v. O'Leary,* (8 Cir.) 131 F. (2) 240, 244; *In re Schermerhorn,* (8 Cir.) 145 F. 341.

In briefs submitted to the court, counsel for respondents undertake to support their jurisdictional challenges of the Petition to Modify. The authorities by them advanced have had the court's careful and respectful consideration. They will now severally receive brief mention and comment.

Duda v. Sterling Manufacturing Company, (8 Cir.) 178 F. (2) 428, originated in this court. Sterling Manufacturing Company's petition for corporate reorganization under Chapter X of the National Bankruptcy Act was filed here, and also was judicially approved, on April 6, 1948. As is presently disclosed, that date has practical significance. Trustees were appointed and entered upon the performance of their duties. The litigation leading to the reported opinion was initiated in this court through the filing against one Duda by the debtor's trustees of a petition for an order requiring Duda to show cause why judgment should not be entered against him in favor of the trustees on separate and distinct items of claim, (1) for the value of goods and merchandise sold to Duda by the debtor corporation on January 15, 1948, for rent for premises leased to Duda, and to him delivered under the same contract, and for the value of the good will of the debtor corporation's truck refrigeration business for which the goods sold and premises leased had been acquired; (2) for the proceeds of a check alleged to belong to debtor received by Duda before the filing of the prime reorganization case, and thereafter retained by him; (3) for goods and merchandise of debtor corporation delivered to Duda on January 15, 1948 under an alleged agreement to pay the debtor corporation the reasonable value thereof, or to return the part thereof unused, if any; and (4) for the value of services rendered and transfers made to Duda by debtor corporation during the reorganization proceedings for the payment of payrolls of Duda's employees, for the value of supplies shipped to Duda, and for commissions to his salesmen. The requested order to show cause was entered and served. Duda, by an ostensible "special appearance" attacked the court's jurisdiction, both summary and plenary. After hearing, the then judge presiding overruled the objection to jurisdiction, and directed Duda to answer, which he did in due time. Essentially, the answer was a factual denial, but with particularizing affirmative allegations, and the alternative assertion, with specifications, of items of setoff against any liability under which he might be found to labor. A reply was filed, maintaining silence respecting a small part, and denying for want of information a somewhat larger part, and, for the rest, admitting a part, but claiming credit on the largest part, of the demanded setoff. On the issues thus made, trial without a jury was had, and this court made and entered a judgment in a large sum of money, allocated to the several items of the trustees' claim, ordering the turnover of property by Duda to the trustees, and wholly denying Duda's claims for setoffs, despite the actual lack of contest in respect of some of them. Upon appeal, the Court of Appeals affirmed the trial court's finding in favor of Duda on the claim for the value of the good will of the truck refrigeration business, but reversed the judgment against Duda, and remanded the proceeding on the basis of the court's denial of Duda's Motion to Dismiss and objections to jurisdiction, and claims for setoff against the trustees. In reaching its conclusion the appellate court declared that,

> "the reorganization court was without jurisdiction in summary proceedings over the first, second and third causes of action as stated above,[12] since all three involve claims of the debtor against Duda accruing before the institution of the reorganization proceedings, which Duda denied, reserving his objections to the court's summary jurisdiction throughout the trial. Nor were any of the issues involved in these claims within the summary jurisdiction of the reorganization court if Duda had admitted the receipt of the property involved by virtue of the alleged transactions with the debtor prior to the institution of the reorganization, since the evidence shows that the property was never within the possession of the reorganization court. Clearly in such circumstances Duda would have been an adverse holder under a bona fide claim and the claims asserted against him not within the summary jurisdiction of the court without his consent.".

Manifestly, the petitioner's demand presently before this court is completely distinguishable on the score of the court's timely possession of and jurisdiction over the asset whose protection is sought, from the claims involved in items (1), (2) and (3) *supra* in the *Sterling Manufacturing Company case, supra.*

With obvious reference to the trustees' claim numbered (4) *supra* against Duda, the Appellate Court did declare (see p. 434 of 178 F. (2)):

> "Assuming, as the court stated in its opinion, although the record is barren of any evidence on the subject and no finding of fact covering it was made, that the bankruptcy court had never authorized the payments and transfers made by the trustees after the in-

> stitution of the bankruptcy proceedings, the claims of the trustees for recovery of the property transferred, and the moneys advanced during the reorganization proceedings were within the summary jurisdiction of the bankruptcy court. And this for the reason that transfers by the trustees without authority of the court cannot destroy the court's possession of the property transferred. *In re Schermerhorn,* 8 Cir. 145 F. 341."

The court does not now neglect the circumstances that the Appellate Court, itself, in the immediately foregoing language seriously questioned the objective validity of the factual hypothesis upon which it asserted the trial court's possession, within the pertinent area, of summary jurisdiction. Nevertheless, the assertion is to be noticed, first, as a deliverance upon a facet of the litigation then before the Court of Appeals, which had been submitted to and considered by that court, and secondly, on the score of its consonance with the prevailing jurisdictional rule already discussed herein.

So far from supporting the respondents' denial of this court's summary jurisdiction in the matter now in suit, *Duda v. Sterling Manufacturing Company, supra,* clearly supports such jurisdiction.

The respondents' citation of and quotation from *First National Bank in Houston, Texas v. Lake,* (4 Cir.) 199 F. (2) 524 (cert. den. 73 S. Ct. 337), of the following language:

> "Appellant fails to distinguish between the power of the reorganization court over property of the debtor which has been pledged as collateral security and which is held by the creditor merely as security for a debt and its power over property which is claimed adversely

> to the debtor by one who is in possession asserting absolute ownership. It is clear that the reorganization court may not exercise summary jurisdiction in the latter case but may exercise it in the former, and in the former case may protect its jurisdiction by proper use of its injunctive power."

is quite without persuasiveness in respondents' behalf. On the contrary, it sustains the petitioner's claim of the court's possession of the summary jurisdiction by petitioner attributed to it.

Respondents' counsel, in citing *In re Mt. Forest Fur Farms of America,* (6 Cir.) 122 F. (2) 232, fail, twice in a single sentence, to meet the test of complete accuracy. First, they premise a statement touching the teaching of that opinion with the participial phrase "citing that language in the disposition of the cause before it", *that language* being the exact excerpt immediately above quoted from *First National Bank in Houston v. Lake, supra.* Now, such a citation would have required preternatural perception. For the *Mt. Forest Fur Farms* opinion was filed on August 16, 1941; whereas the opinion in *First National Bank in Houston v. Lake* was not filed until October 7, 1952. Secondly, the brief writer declares that the *Mt. Forest Fur Farms* case "held that the jurisdiction of the court under summary proceedings must be determined first of all by reference to whether or not the adverse claimant's claim is substantial or merely colorable." But the writer of the opinion so relied upon seems not to have spoken thus categorically. For he opened the discussion of the legal posture of the litigation before him (p. 238) with the following paragraph:

> "(1) (1) The challenged jurisdiction must be resolved, not by the test of title, but by determination of

> the issues of possession of the res in controversy as of the time reorganization proceedings were instituted by the debtor corporation."

He does, indeed, emphasize the essentiality in a proper context that the adverse claim be not merely colorable. But he follows that emphasis with an explanatory paragraph, wherein he quotes at length from the opinion of Mr. Justice Brandeis in *Taubel-Scott-Kitzmiller Company, Inc. v. Fox*, 264 U. S. 426, 44 S. Ct. 396, 68 L. Ed. 770. The entire paragraph has present historical interest, but the final sentence quoted from the opinion of Mr. Justice Brandeis is:

> "But in no case *where it lacked possession,* could the bankruptcy court, under the law as originally enacted, nor can it now (without consent) adjudicate in a summary proceeding the validity of a substantial adverse claim." (Emphasis added.)

The primatial impact of possession, actual or constructive, upon the possession of summary jurisdiction is thus emphasized in the *Mt. Forest Fur Farms* case.

In re Journal-News Corporation, (D. C. N. Y.) 104 F. Supp. 843, is hardly in point on the question of jurisdiction in the present setting. Jurisdiction was affirmed in it, but, rather inaccurately on the ground of "ownership" by the debtor of the right whose vindication was sought. And in association with that determination of ownership, the writer of the opinion also found that the claim of the adverse user of the right "was merely sham and colorable."

Respondents' citation of *Walker Manufacturing Company v. Bloomberg,* (1 Cir.) 298 F. (2) 688[13], is not supportive of their denial of summary jurisdiction in this court over the present controversy. The opinion thus cited arose in a factually complex case, and, perhaps on that account, itself lacks precision in expression. But this is clear; it did not deny, but on the contrary declared, the trial court's possession of summary jurisdiction over the controversy before it. Coming to grips with that problem, it said (p. 694):

> "* * * we believe that the district court's finding that until the Bolton visit (and subsequent to November 28)[14] Walker lacked sufficient knowledge to 'exploit' the process, is supported by the evidence. *For these reasons we believe that the district court possessed jurisdiction.*" (Emphasis added.)

Having thus affirmed summary jurisdiction, the appellate court proceeded to the examination of its exercise, and on the merits—and properly, as it seems—reversed the trial court. The case is authority for the proposition that the district court's possession of jurisdiction in a case of the present character is no mandate for the determination of the ultimate controversy in litigation favorable to him who has correctly asserted the reality of jurisdiction.

Respondents' quotation from *Cline v. Kaplan*, 323 U. S. 97, 65 S. Ct. 155, 89 L. Ed. 9 (which they advance only as an incident to their citation of *In re Muntz TV, Inc.*, (7 Cir.) 225 F. (2) 489, *infra*) is inexact. From 323 U. S. 98 and 99, the language of *Cline v. Kaplan* is copied as follows:

> "A bankruptcy court has the power to adjudicate summarily rights and claims to property which is in the actual or constructive possession of the court. *Thompson v. Magnolia Co.*, 309 U. S. 478, 481. If the property is not in the court's possession and a third person asserts a *bona fide* claim adverse to the receiver or trustee in bankruptcy, he has the right to have the

merits of his claim adjudicated 'in suits of the ordinary character, with the rights and remedies incident thereto.' *Galbraith v. Vallely,* 256 U. S. 46, 50; *Taubel-Scott-Kitzmiller Co. v. Fox,* 264 U. S. 426. But the mere assertion of an adverse claim does not oust a court of bankruptcy of its jurisdiction. *Harrison v. Chamberlin,* 271 U. S. 191, 194. It has both the power and the duty to examine a claim adverse to the bankrupt estate to the extent of ascertaining whether the claim is ingenuous and substantial. *Louisville Trust Co. v. Comingor,* 184 U. S. 18, 25-26. Once it is established that the claim is not colorable nor frivolous, the claimant has the right to have the merits of his claim passed on in a plenary suit and not summarily. Of such a claim the bankruptcy court cannot retain further jurisdiction unless the claimant consents to its adjudication in the bankruptcy court. *MacDonald v. Plymouth County Trust Co.,* 286 U. S. 263."

Cline v. Kaplan is actually authority for the bankruptcy court's possession of summary jurisdiction in the present setting, where the property in controversy at the time was in the possession, actual or constructive, of the debtor. It is so cited herein, *supra.*

Nor, properly understood, is *In re Muntz TV, Inc.,* (7 Cir.) 225 F. (2) 489, presently in point in respondents' favor upon the jurisdictional issue. It is true that the Court of Appeals in that case reversed the district court's judgment for the trustees in the exercise of a supposed summary jurisdiction, and held the claimants to have been entitled to trial in a plenary suit. But that reversal was patently premised upon appellate court's view, first that an escrowee's possession of the fund in controversy was for the use and benefit of the lessor claimant, wherefrom arose, at its outset, a possession, at least constructive, by the claimant as against the trustees, and, secondly, that the claimant's claim was not colorable or frivolous, but was rather ingenuous and substantial. In other words, the conclusion of ingenuousness and substantiality was there predicated in respect of a fund of which the lessor claimant at the institution of the reorganization proceeding, had "possession, actual or constructive."

In *Harrison v. Chamberlin*, 271 U. S. 191, 46 S. Ct. 467, 70 L. Ed. 897, also, it is made manifest that the trustee filed in the bankruptcy court a petition "for a summary order requiring Mrs. Chamberlin, a stranger to the proceeding, to deliver to him *certain money in her possession*" (emphasis added), which she claimed was her individual property. In that setting, and correctly, the appellate court held that the respondent's claim of title was made in good faith, and that as a *bona fide* claimant in possession she was entitled not to be proceeded against summarily, but to a trial in a plenary suit.

This court concludes that the authorities by the respondents relied upon are inadequate support for their denial of the court's possession of summary jurisdiction over the present controversy. On the contrary, it is satisfied that in their entirety they recognize the jurisdictional rule set out at the opening herein of that subject. They are, indeed, largely examples of the judicial application of that rule to the several factual settings out of which the opinions respectively so cited arose.

The court, therefore, holds with the petitioner upon the issue of its possession of summary jurisdiction over its petition to modify, aimed against the respondents, and rejects the respondents' challenge against such jurisdiction.

Having dealt thus affirmatively with the important question of its possession of jurisdiction over the controversy between the petitioner, on the one hand, and the respondents, on the other, the court proceeds to the merits of that controversy, and, first, to its underlying facts, additional to the history of this proceeding, already recalled at length, *supra*.

The date of incorporation of the debtor, Kelly Ryan Equipment Company, has already been set out herein. The notable identifying portion of its corporate name is, and has been, the personal name of its principal stockholder and, as president, one of its active officers, Kelly Ryan, otherwise known as Kelly P. Ryan, a citizen of Nebraska, and a resident of Blair, in that state. Kelly Ryan is also a stockholder, and the President, of the petitioner herein, Blair Manufacturing Company. In fact, as such President, he signed in behalf of Blair Manufacturing Company, the offer of purchase (filing 597, *supra*), which this court later accepted. From March 25, 1947, the date of its incorporation, *supra;* to and including February 8, 1955, on which day the petition for corporate reorganization was filed herein, *supra*, Kelly Ryan Equipment Company engaged continuously, with its principal office and place of business at Blair, Nebraska, chiefly in the business of manufacturing and selling items of farm equipment.[15]

Emmett Hampton, a native of Tekamah, Nebraska (located not far distant from Blair), has resided in Blair since 1957, became an employee of Kelly Ryan Equipment Company on April 23, 1950, and remained in that employment until the institution of this prime reorganization proceeding on February 8, 1955. On the appointment of the trustee herein, he persisted in that service, but, from that date, in the employment of the trustee. He was employed in the first instance as a salesman for Kelly Ryan Equipment Company. He continued in that capacity but later became the manager of sales for Kelly Ryan Equipment Company with the title of "Sales Manager". He was serving in that position on February 8, 1955, and remained in it, but in the employment of the trustee, until about November 25 or 26, 1956. He was never an officer or a stockholder of Kelly Ryan Equipment Company. At the time last mentioned, the trustee, from considerations of economy, terminated in behalf of his trust the position of sales manager, and abandoned the maintenance of a direct dealers' organization, and signified to Emmett Hampton his resolution thereafter to market Kelly Ryan Equipment Company products through distributors within various trade territories. Emmett Hampton, thereupon, sought from the trustee an understanding to the effect that he, Emmett Hampton, become the distributor of Kelly Ryan Equipment Company products for the area consisting of the states of Nebraska and Kansas. And the trustee and Emmett Hampton then orally agreed that such regional distributorship be at once operative. Thereupon, and at first as an individual operator, Emmett Hampton engaged in business as the distributor for Nebraska and Kansas of the products of Kelly Ryan Equipment Company, then being produced and sold by the trustee. 8.

At or immediately before the erection of the arrangement last mentioned, and upon the notification by the trustee of the termination of Emmett Hampton's employment as sales manager for the trust, Emmett Hampton approached Kelly Ryan, then president of Blair Manufacturing Company, and from Blair Manufacturing Company, through Kelly Ryan, sought employment. No such employment occurred. Nor, at that time did Emmett Hampton discuss with Kelly Ryan any project on his own part for his acquisition of the distributorship of Kelly Ryan Equipment Company products through the trustee.

For a brief period commencing at the time of the arrangement, *supra*, for his distributorship in the areas of Nebraska and Kansas, Emmett Hampton operated as such distributor in his individual capacity, but used therefor the name "Hampton Distributing Company", not in a corporate capacity but as a trade name. However, effective August 1, 1958, he erected the corporation, now with him a respondent herein, under the name of Hampton Distributing Company.[16] For all practical purposes, Hampton Distributing Company is the corporate reflection and operating instrumentality of Emmett Hampton. He is the owner of forty-seven, out of its entire fifty, shares of outstanding capital stock, and its president, and one of its directors. Of the remaining three shares of such stock, one is owned of record by each of the remaining three of its directors, of whom one, a brother of Emmett Hampton, is its vice-president, one, a daughter of Emmett Hampton, is its secretary, and the third, a Mr. Cecil Way of Lincoln, Nebraska, is its treasurer.[17]

While this court, in the absence of the articles of incorporation and bylaws of Hampton Distributing Company, accepts as true Emmett Hampton's testimony to the effect that, according to its bylaws, it is authorized "to transact distributing business, farm equipment, manufacturing . . . anything in that particular phase of that type of business", it also finds that Hampton Distributing Company actually engages in the *distribution* of farm equipment, and is not engaged in the *manufacture* of anything.

Beginning in January, 1957[18], Hampton Distributing Company (with the reservation noted in the most recent footnote), maintained its office in the main office building of Kelly Ryan Equipment Company. On the same floor with, and adjacent to, the offices of Kelly Ryan Equipment Company, Emmett Hampton, both personally and as president and principal officer of Hampton Distributing Company, had what he called his private office and an office wherein two female employees worked, and the files and office equipment of himself and Hampton Distributing Company were kept. That arrangement and occupancy persisted "until the sale to Blair Manufacturing Company was consummated." In the quotation just made, the court is using the language of Emmett Hampton as a witness in a deposition taken herein, and selectively introduced and received upon the trial of the instant controversy. However, as given, that testimony was immediately qualified by the witness. For in response to a further question by petitioner's counsel, he said that, "that would have been in September of 1963." Certainly the occupancy adverted to persisted through September 19, 1963, or September 20, 1963, on the former of which dates the order approving sale to the petitioner herein was by this court announced and entered, and on the latter of which dates the formal written order reflective of such approval was filed, *supra*. Strictly construed, the "consummation of the sale" to petitioner could be considered to have occurred on December 18, 1963, when this court, upon the trustee's petition therefor, made and entered its order, recognizing and approving such consummation. But the court considers that in the context of the testimony relevant thereto, the termination of the distributorship in behalf of the trustee should be taken and considered to have occurred on September 19, or 20, 1963. The court, however, does not find that Emmett Hampton and Hampton Distributing Company completely abandoned any coming to, and going from, their office space in the place of business of the trustee on either of the two dates last mentioned. Almost certainly, some such coming and going continued for a few, and not exactly established number of, days thereafter.

For the office space in the Kelly Ryan Equipment Company plant so allocated to, and used in, their business of distribution by Emmett Hampton and Hampton Distributing Company, neither Emmett Hampton nor Hampton Distributing Company was required to pay to the trustee, or any one else, any rent, or anything in lieu of rent. The court has clearly in view the fact that as a witness in the deposition already mentioned, Emmett Hampton, with manifest resentment, added to his answer admitting such nonpayment the sentence, "Indirectly I paid plenty for it." The court may not, and does not, speculate concerning his meaning in that volunteered statement. Whatever its underlying thought, as it stands before the court, it leaves unchallenged the fact that he and his corporation were not charged for, and did not pay, rent as such. But in the present ruling this court attributes no decisional influence to that nonpayment. Whatever the arrangement—or lack of arrangement—concerning rental for the space involved, Mr. Hampton and his corporation occupied and used the space for their business, which, incidentally, included the operation of distributorships for farm equipment produced by manufacturers wholly unrelated to the trustee or to Kelly Ryan Equipment Company but, in part at least, identified by Emmett Hampton as a witness herein.

At this point, it is recalled that the respondents, that is to say, both Emmett Hampton and Hampton Distributing Company ("by Emmett Hampton, its president and principal stockholder"), had joined with two other individuals in a written "offer of purchase", dated August 2, 1963, and in a written "amendment" of such offer to purchase, dated August 16, 1963, wherein they and their associates offered to purchase the principal assets of Kelly Ryan Equipment Company, then in trusteeship herein.[19] Emmett Hampton signed both of those instruments, not only as an individual, but also as president and principal stockholder, and for and in behalf, of Hampton Distributing Company. It is here noted that the amendment of offer to purchase, dated August 16, 1963, so far as the record discloses, was and is the last step in the offer to purchase made by Emmett Hampton and Hampton Distributing Company and their associates. And it is further observed that one of the amendments made by that instrument was the extension from August 20, 1963, to September 6, 1963, of the date, as of which "said offer would be terminated and null and void, if said offer had not been then accepted." The makers of that offer, as amended, may well be considered to have regarded their offer as having, by its own terms, become "null and void" as of the end of September 6, 1963, in consequence of its failure, on or before that date, to achieve acceptance and the consummation of the sale by it contemplated. For, by the original offer, *both* acceptance of the offer and consummation of the proposed sale by the specified date were prescribed as necessary to the persisting effectiveness of the offer. And by the amendment only the foregoing postponement of the critical date—not the operative consequence of its passage without acceptance and consummation—was altered on the score of a limitation of time.

Emmett Hampton, meanwhile, remained for at least a brief interval in the strategic position already noted. His office, both personal and as president and virtually sole stockholder of Hampton Distributing Company, remained in the same building with, and adjacent to, the offices of Kelly Ryan Equipment Company. Thus positioned, he procured from the files of Kelly Ryan Equipment Company a very large, but not exactly determinable number of blueprints, drawings and tracings, the property of Kelly Ryan Equipment Company, reflective of the manufacturing details and specifications of feeder wagons (especially model 48), elevators and manure spreaders, and of the component parts of such items of equipment and each of them, manufactured and sold by Kelly Ryan Equipment Company, through the trustee. The evidence convinces this court, and the court finds, that Emmett Hampton, himself, withdrew the blueprints, drawings and tracings from their places of storage, and that he did it, not in a single operation, but by taking different groups of blueprints, drawings and tracings at several times extending through a few weeks. But that is a matter of detail rather than substance. It is certain that they were gotten pursuant to a considered resolution on his part to make use of them, and that he took and held their possession pending that use.

The precise time when the blueprints, drawings and tracings were abstracted from the files of Kelly Ryan Equipment Company is in dispute. Emmett Hampton, as a witness, testified broadly that he took possession of the original blueprints, drawings and tracings "when it became quite evident that there was a possibility that the offer that myself and a couple of other gentlemen in Blair, Nebraska, had transmitted to the court or to the trustee would, in all probability, not be sufficient to obtain possession from Kelly Ryan," but without specifying the exact, or even the instructively approximate, dates when his several takings or any of them occurred, or the number of such abstractions. That is possible, and is probably reconcilable with the use he shortly made of them, *infra.* But it is also true that, as a witness he placed considerable emphasis in relation to the time of the taking of the blueprints, drawings and tracings upon the circumstance by him asserted that, at some date (which he did not clearly identify), before this court's hearing on September 19, 1963, he had arrived at the conclusion that the offer, as amended, of him and his associates would be inadequate to prevail and receive the court's approval upon that hearing. And their offer by its own terms had expired as of September 6, 1963. The need to await (before the taking of the prints, drawings and tracings), the hearing and ruling would hardly have been apparent, in the light of his own acknowledged thinking. But the court does not regard the precise days whether after, or within a few days before, the hearing, when Emmett Hampton obtained the actual possession of the prints, drawings and tracings as presently dispositive. Much more significant is what, promptly in either supposition, he did with them.

Emmett Hampton secured and took possession of the several blueprints, drawings and tracings thus gotten by him, to the end that he might, and with the intention that he would, use them to enable him, and Hampton Distributing Company thereafter, to compete, or to facilitate and expedite his and Hampton Distributing Company's then actively contemplated competition, with Blair Manufacturing Company, the eventually successful bidder and purchaser of the assets (less minor and presently irrelevant items thereof) of Kelly Ryan Equipment Company, in the manufacture and sale of farm equipment, particularly of feeder wagons (especially Model 48), elevators and manure spreaders. In furtherance of that objective, he promptly—but apparently in successive groups—took, or caused to be taken, a large number of the blueprints, drawings and tracings so abstracted from the files of Kelly Ryan Equipment Company, to the office of Standard Blue Print Company of Omaha, Nebraska, which was and is engaged, among other things, in the duplication and photographic reproduction of blueprints, drawings and tracings.[20] And he caused Standard Blue Print Company to make for, and deliver to, Hampton Distributing Company duplicate copies of those blueprints, drawings and tracings. And Standard Blue Print Company did make such duplicate copies and deliver them, with statements of its charges therefor, and with the original items thus copied, to Hampton Distributing Company. Precisely when the original blueprints, drawings and tracings, or the several items thereof, were delivered to Standard Blue Print Company for copying is not conclusively shown. However, it is shown in evidence that Standard Blue Print Company, on each of three dates, namely, September 26, 1963, September 27, 1963, and October 3, 1963, tendered to Hampton Distributing Company, immediately on the completion of its duplication services incident thereto, bills or statements, thereupon paid by Hampton Distributing Company, for large numbers, as of each of those dates, of copies of such blueprints, drawings and tracings. And the evidence convincingly shows that, in its usual business operations, bills for such duplications were by Standard Blue Print Company regularly rendered on the date of the charged service, and the service was customarily performed on the dates of deliveries of the originals to be copied. Hence, it is certain that the originals represented by the several bills were delivered to Standard Blue Print Company on or before September 26, 1963, September 27, 1963, and October 3, 1963, respectively.

Once copied, and, with the copies, delivered to Emmett Hampton, the originals of the abstracted blueprints, drawings and tracings were, by Emmett Hampton, returned to, and replaced in, the files of Kelly Ryan Equipment Company. He appears so to declare; and there is no persuasive evidence before the court that he did not make such return and replacement. In fact, the court understands, and finds, that insofar as the respondents, pursuant to the earlier orders of this court, *supra*[21], delivered the copies to the petitioner upon the latter's receipts therefor[22], a verification was thereafter made by or in behalf of the petitioner, which disclosed that the original blueprints, drawings and tracings, whose identifying numbers appeared and appear on those receipts, were then in the files of Kelly Ryan Equipment Company, by that time transferred to, and in the possession of the petitioner.

It is here, and briefly, observed that Kelly Ryan Equipment Company maintained a system of identification of its blueprints, drawings and tracings by numbers, with a separate number, prefixed with a letter, for each of such items. The prefixed letters identified the several equipment products of Kelly Ryan Equipment Company for which the parts reflected in the blueprints, drawings and tracings were severally made and utilized. Thus, the letter "F" disclosed applicability to feeders or feeder wagons; the letter "E" to elevators; and the letter "S" to spreaders or manure spreaders.

Out of the blueprints, drawings and tracings so taken by Emmett Hampton, he selected for use those which in his opinion would most effectively serve his purpose in their taking, *supra.* Some of them he sent to certain foundries, including Independence Stove and Manufacturing Company, Independence, Missouri, and Progressive Foundry, Inc., Perry, Iowa, as the bases for the making of castings. Also as such bases, in respect of some parts, he provided for duplication certain already manufactured physical parts of Kelly Ryan Equipment Company products, or Kelly Ryan Equipment Company patterns therefor. And that included castings. As of September 26, 1963, Independence Stove and Manufacturing Company billed Hampton Distributing Company for 12,632 pounds of rough iron castings shipped in eighteen fibre barrels. And as of December 4, 1963, Progressive Foundry, Inc., billed Hampton Distributing Company for 428 castings shipped on December 3, 1963. And the latter bill, interestingly, identifies the date of the order by Hampton Distributing Company for those castings as September 6, 1963.[23]

Also, out of those blueprints, drawings and tracings, an inexactly identified number, *including blueprints relative to the feeder wagon,* were delivered by Emmett Hampton to Concrete Equipment Company. Concrete Equipment Company then was a manufacturing or fabricating concern engaged chiefly in the manufacture of concrete handling equipment, whose office and plant were in the near neighborhood of the offices of Kelly Ryan Equipment Company, and of Emmett Hampton and Hampton Distributing Company. And those blueprints were delivered to it for its use in the manufacture (or "assembling", or both) of a feeder wagon for Hampton Distributing Company for sale by the latter in the market to its interested trade. By arrangement with Emmett Hampton, Concrete Equipment Company undertook to produce for Emmett Hampton and his corporation a feeder wagon for the market, and, promptly thereafter began such task and did so manufacture, or "assemble", at least nine or ten such units, *prior to January 2, 1964* (on which date Emmett Hampton testified herein by way of deposition used upon the trial). In such manufacturing operation, Concrete Equipment Company also caused castings to be made for it by foundries from certain of the prints furnished to it by Emmett Hampton. In such use, some of the prints were altered by the excision therefrom of portions identifying the prints, by the legend "K-

R", as the product of Kelly Ryan Equipment Company. Actually, many of the other prints taken and used by Emmett Hampton, *supra,* were similarly identified as the product, thus, the property, of Kelly Ryan Equipment Company. And a considerable number of the Kelly Ryan Equipment Company castings herein involved including the identifying "K-R" legend stamped in or on the metal of the castings. And some of the castings procured or provided and used in the manufacture of the Hampton Distributing Company feeder wagon, *supra et infra,* were so used and installed, bearing the "K-R" legend, and without its removal or obliteration.

At this point, the court makes and preserves a finding touching the copies of blueprints, drawings and tracings belonging to Kelly Ryan Equipment Company, but embraced within the sale to Blair Manufacturing Company, that were made for Emmett Hampton and Hampton Distributing Company, and the copies that were later returned, pursuant to the orders of the court, to Blair Manufacturing Company. From the evidence, the court finds that Standard Blue Print Company made and delivered to Hampton Distributing Company 967 such copies. That does not mean that it made and delivered one copy each of 967 originals. It means merely that such number of copies were made and delivered. It is, therefore, possible that more than a single copy may have been made and delivered of one or more or many of the originals.[24] But, in ostensible compliance with this court's two several orders upon the subject, the respondents, pursuant to the two receipts already mentioned, returned, in the aggregate, only 622 copies. The court, therefore, concludes that, of the copies made and received, the respondents failed to return to Blair Manufacturing Company some 345 of such copies. The respondents undertook on the trial to advance the view that in their handling and use, some of the copies were destroyed. The evidence in that behalf is unconvincing.[25]

Moreover, though this point appears to be disputed, the court finds that Emmett Hampton made or caused to be made verifax copies of some of the blueprints, drawings or tracings of which he took possession. The precise number of such verifax copies, and the original items thus copied, are not established. But, despite the court's orders herein, no such verifax copies were ever delivered to Blair Manufacturing Company.

In the course of the business of Kelly Ryan Equipment Company, it first developed and placed on the market, its elevator; somewhat later it began to make and market its manure spreader. And of the three items, its feeder wagon was the last to be made and marketed. In fact, Blair Manufacturing Company was also engaged in the farm equipment manufacture and sale business, during a part of the time when Kelly Ryan Equipment Company was similarly engaged. And the Model 48 Kelly Ryan feeder wagon was actually copied from a feeder wagon which was already being made and sold by Blair Manufacturing Company. And the Model 48 feeder wagon was not developed by or in behalf of Kelly Ryan Equipment Company until sometime after February 8, 1955, when this reorganization proceeding was filed, *supra*.

Some of the parts designed originally by Kelly Ryan Equipment Company for inclusion in its manure spreader, which bear an identifying letter "S" are usable in the making of its Model 48 Feeder Wagon. It is explained, from the sequence in which Kelly Ryan Equipment Company's elevator, manure spreader, and Model 48 Feeder Wagon were designed, and initially introduced upon the market, *supra,* that such interchangeability of individual component parts in the making of its products, is more likely in relation to parts designed originally for use in the elevator or manure spreader than in relation to parts designed originally for use in the Model 48 Feeder Wagon. This results from the circumstance that, of those three products, the Model 48 Feeder Wagon was the last to be designed and introduced.

Hampton Distributing Company, through and by Concrete Equipment Company, designed, manufactured, and produced its feeder wagon, known as Hampton Multipurpose Feeder Unit, during the last days of September (that is, after the abstraction of the blueprints, drawings and tracings), and through October, and November, and the first two weeks of December, in 1963. In that process, the first step was that of design, and the manufacturing and assembling phases followed. Upon the evidence—and recognizing the presence in the evidence of some variety of recollection touching dates—the court finds that the one of these manufactured items, first to be observed publicly, appeared on the street about December 12 or 13, 1963. One of such feeder wagons was carefully and closely examined on December 24, 1963.

The Hampton feeder wagon was and is very similar in external appearance, size, design and color, to the Kelly Ryan Equipment Company Model 48 Feeder Wagon. They are essentially alike in their intended and actual function and operation. Moreover, they possess many identical or interchangeable parts. Among those like parts are mentioned, without individual elaboration, the apron flight, the idler shaft, the apron drive sprocket, the left flight, the apron idler sprockets (which are iron castings bearing the "K-R" identification), the apron drive shaft, the left chain with an attached link, the cross conveyor, the main trough, the square base bearings (each, a casting bearing the imprint, "K-R-7-A-112", and cast from a Kelly Ryan Equipment drawing or pattern), of which there were six unaltered installations on the Hampton wagon, plus two others that had been bored to receive inside of each a roller bearing, three "U" bearings, and the front drive reverse case. Those several parts, thus identical and interchangeable, are reflected in the number of blueprints, drawings and tracings taken and thereafter returned, *ut supra*, by Emmett Hampton.

It is true that the numerous portions of the Kelly Ryan Equipment Company Model 48 Feeder Wagon, thus duplicated in the Hampton feeder wagon, including all of the items above enumerated, as well as many others, and its dimensions, or size, general appearance and color, could, after adequate inspection, scrutiny and measurement, have been copied competently and accurately by persons possessed of the considerable special skills requisite for each such task. And there is, before the court, evidence for the respondents, especially from one witness, that in the course of the Hampton work, a Model 48 Kelly Ryan Equipment Company feeder wagon was completely dismantled and, after such effort, that wagon's overall design and structure, and also its component parts, were duplicated in, and built into, the Hampton wagon. The court has no manner of doubt that, given adequate time and numbers, and skills, of men, such copying would be possible. But the court is even more firmly persuaded, and finds, that the actual duplication here under consideration, and which alone is presently involved, did not result from such an effort. The time expended in the production of the Hampton wagon, from conception to completion, even if the respondents' liberal version of that time be accepted, was too short for its completion. But, more to the point, Emmett Hampton never intended to, and did not, proceed in that dilatory manner. Once resolved upon the project, he resorted to self help, went to the blueprint, pattern and tracing files of Kelly Ryan Equipment Company, located so near to his office and place of work, and abstracted therefrom the blueprints, patterns and tracings which, from his long association and occupational contacts with Kelly Ryan Equipment Company, he felt, in fact knew, would serve his purpose. He then procured the duplication of a very large number of those blueprints, drawings and tracings, and placed them in the hands of selected foundries, as well as of Concrete Equipment Company, procured by him to manufacture, or, as he expressed it, to "assemble" his proposed appliance. Emmett Hampton deliberately caused the building of Hampton Distributing Company's feeder wagon essentially from the blueprints, patterns and tracings which he took from the files of his then recent employer and business associate, and from some readily accessible feeder wagon parts for the Kelly Ryan feeder wagon. His own evidence, despite a manifest purpose to obscure this conclusion, repels any inference that he pursued the slow and cautious course now by his evidence attributed to him in the submission of this controversy.

As a witness, Emmett Hampton testified that, at his request, Reed O'Hanlon, Sr., the trustee appointed by the court and serving in this reorganization proceeding, at an inexactly determined date, but probably before or early in September, 1963, granted to Emmett Hampton permission to purchase from, and have made by, Progressive Foundry of Perry, Iowa, castings from molds of Kelly Ryan Equipment Company for its products, not otherwise identified. And he also testified that he obtained a like permission from one Louis Murdock, whom he described as "the acting manager of the Kelly Ryan Equipment Company for the trustee", the latter permission extending both to castings made by Progressive Foundry and to castings made by Independence Stove and Metal Company. His oral testimony to that effect is not denied. Besides, as an exhibit, the evidence includes a carbon copy of a letter bearing date September 16, 1963, addressed to Progressive Foundry in this language:

> "This is your authority to fill orders of the Hampton Distributing Company using this Company's molds for castings.
>
> "This authorization shall remain in force until notified in writing of any change."

Although only in type, the signature is indicated to be:

"KELLY RYAN EQUIPMENT COMPANY
Louis Murdock, Manager"

And Emmett Hampton testified that a like letter was sent to Independence Stove and Metal Company, as well as to

Progressive Foundry. The court finds that the asserted consent of Reed O'Hanlon, Sr., was given, and the asserted letters of Louis Murdock were written and transmitted. But the court attributes no present decisional consequence to either, or any, such consent. In the first place, the consent, if any, applied only to the acquisition of castings—thus, potential mechanical repairs—by Hampton Distributing Company; and Mr. Hampton declared in response to an explicit question, as follows:

> "Q. Were you employed as a distributor for the products of Kelly Ryan Equipment Company in reorganization at the time you placed the order for castings from Progressive Foundry in Perry, Iowa?
>
> A. *I was a distributor for Kelly Ryan Equipment* at that time, yes." (Emphasis added.)

Moreover, Mr. Hampton, in the same context testified that he talked to Mr. O'Hanlon on the subject of the procurement of castings "on several occasions . . . during month of September, not only during the month of September but even prior to" (sic). And when pressed further, he made the following answer to the following question:

> "Q. My question, Mr. Hampton, was limited to a period after September 1, 1963, did you talk with anyone after September 1, 1963?
>
> A. I don't recall that I did, no."

Confusingly though, the Murdock letter, *supra*, was dated September 16, 1963.

It is to be remembered, however, that up to September 19, 1963, the court had not held the hearing, or made the order, respecting the pending written offers to purchase nearly all of the assets of Kelly Ryan Equipment Company, that Blair Manufacturing Company did not file its offer until September 18, 1963; that, until the latter date, the offer in writing made by the respondents and their associates in a large sum of money was the highest filed bid for such assets, subject, of course, to its own limitation to September 6, 1963, of its effective date, *supra,* and that, from his own testimony, Emmett Hampton considered Hampton Distributing Company then to be the distributor of Kelly Ryan Equipment Company products. Whatever was said between him, on the one part, and the trustee, Mr. O'Hanlon, and Louis Murdock, on the other, was presumably said in the context of the facts already noted in this paragraph.

Finally, it is not pleaded by the respondents, or either of them, that they possess, or either of them possess, any right in this case adverse to the petitioner herein, to them or either of them granted by either Mr. O'Hanlon or Louis Murdock. Nor is any such right embraced, in all the circumstances, in a grant to Hampton Distributing Company, then the distributor of Kelly Ryan Equipment Company products, of the opportunity to procure and buy castings as above discussed. But if it be thought that the grant of any such right was then effected, or even attempted, such thought is completely invalid. The bestowal of such a right would be wholly beyond the authority of Murdock as "acting manager" or, as he described himself, "manager". And even Mr. O'Hanlon, the trustee, had no such authority, without his full presentation of the project to, and the approval of, the court. Those two men, by virtue of their respective positions, *supra,* and without express approval by the court, could, it is true, make sales, and thus transfers, of products of Kelly Ryan Equipment Company to its regular customers. Indeed, authority to that end is implicit in the order designating the trustee and defining his duties. But their bestowal upon any one of the rights which the respondents have assumed in this subsidiary litigation to exercise, would involve the disposition or diminution of a material part of the assets of the trust, and for its validity would require an approving or directing order by this court. No such order has been entered or made. None has been sought.

Another fact reflective of the attitude and intent of the respondents is now recalled. Hampton Distributing Company, as a corporate resident and business entity of Blair and Washington Counties, in Nebraska, through 1964 was a customer of the operator of telephone service within that county and city. There is in evidence before the court as an exhibit, a copy of the July, 1964, Washington County Telephone Directory,[26] inclusive of the City of Blair. On page 15 of its "Classified Telephone Directory", that is to say, the commonly characterized "yellow sheets", under the caption "Farm Equipment & Supplies" appears the following listing:

> "HAMPTON DISTRIBUTING CO.
> Distributors of Kelly Ryan Equipment
> 1757 Front Blair."

Actually the respondent, Hampton Distributing Company, was not, through or during 1964, a distributor of "Kelly Ryan Equipment" and had not been since some time in September, 1963, *vide supra.* Notwithstanding which, the listing immediately above quoted was, by Emmett Hampton, caused—or allowed—to be published and circulated some ten months thereafter. Whether that occurred by design of the subscriber, the evidence does not show, and the court makes no finding. If it happened through inadvertence, one would encounter difficulty in the circumstances, in disregarding the deceptive oversight.

Upon the entire evidence before it, the court finds and concludes that on or, within a few weeks (probably not more than two weeks), before, September 19, 1963, Emmett Hampton, who had been in the employment of Kelly Ryan Equipment Company and, after the inception of this reorganization proceeding, of the trustee herein, all *supra*, and who, later, and pursuant to an oral arrangement with such trustee, and within the building housing the Kelly Ryan Equipment Company's headquarters, had operated his own corporation, Hampton Distributing Company (of which he was a director and president, and the owner of all but three shares of the capital stock), as the distributor for Kelly Ryan Equipment Company farm equipment products, within the territory comprising Nebraska and Kansas, decided to cause and procure, in the name and behalf of Hampton Distributing Company, the manufacture and sale to the trade of certain items of farm equipment, including feeder wagons, elevators and manure spreaders, essentially duplicative of like items which then were being and, for some time theretofore, had been, manufactured and sold to the farm equipment trade by Kelly Ryan Equipment Company and, during the pendency of this proceeding, by the trustee herein. That entire finding is made in the light of the factual history already set out herein. And that factual history includes his then recent offer (as amended) in behalf of himself and Hampton Distributing Company and two others, to purchase nearly all of the assets and business, including the good will, of Kelly Ryan Equipment Company, and to pay therefor the sum of $250,000.00, and also Emmett Hampton's then existing opinion, formed after his tender of the amendment of that offer, that the offer (as amended) would probably not be accepted. It was his purpose thereby to enter into competition, to the extent of such contemplated operations, with such entity as should be the successful offeror for such assets, business and good will. And he expected to profit in such competition, by reason of his long and familiarly known association with Kelly Ryan Equipment Company in the selling to the farm equipment trade of its products, and the acquaintance existing between him and prospective purchasers in such trade. Pursuant to that decision, he took the several steps reflected in the factual statement already made herein. And as a result of those steps, he caused to be produced, and had ready for introduction into the market the Hampton Multipurpose Feeder Wagon unit, *supra,* so designed and manufactured or assembled, as essentially to duplicate the Kelly Ryan Equipment Company Model 48 Feeder Wagon in the several respects and particulars already mentioned, inclusive of essential function, general appearance, and many exactly identical and interchangeable parts. So proceeding, he intended and expected and undertook, especially with the aid of his own association in the farm equipment trade with Kelly Ryan Equipment Company, to produce in the minds of the purchasing members of that group a practical confusion between the Kelly Ryan Equipment Company feeder wagon and the Hampton Multipurpose feeder wagon unit, and thereby to obtain for the Hampton Multipurpose feeder wagon unit patronage based on its identity with the Kelly Ryan Equipment Company's Model 48 feeder wagon, and the trade's familiarity with his own long association and responsible relationship with Kelly Ryan Equipment Company.

So far as the record before the court discloses, Emmett Hampton and Hampton Distributing Company have not, or at the time of the trial herein had not, proceeded with the production for the farm equipment market of elevators or spreaders or manure spreaders, in a measure, the same as, or comparable with, their progress, *supra,* in relation to feeder wagons. But they persisted, and still persist, in their intention and in the assertion and maintenance of their claimed right, at their pleasure and convenience, so to proceed.

An inevitable consequence of the persistence by Emmett Hampton and Hampton Distributing Company in their prosecution of such contemplated action, if it be not intercepted, will be the substantial reduction, through competitive minimuration of sales of feeder wagons, elevators and spreaders, of the value of the assets and good will of Kelly Ryan Equipment Company, for which the petitioner made its offer, and, on its acceptance, paid to the trustee herein the not inconsiderable sum of $300,000.00.

The court does not deal here with the protection of a right asserted under any patent or patents. Neither the Kelly Ryan Equipment Company feeder wagon, elevator and spreader or manure spreader, nor any one or more of them, is or are covered by any letters patent. It is not overlooked that in the trial it was said by a witness that a single part used on one of the three specially identified items of equipment was covered by a patent. But no issue rooted in a patent monopoly is tendered by either the petitioner or the respondents. Nor is any copyright protection sought. No pertinent copyright existed.

Moreover, the petitioner does not contend that, as the successor by purchase to Kelly Ryan Equipment Company, it is legally immune to any or all competition. In short, both the petitioner and the respondents recognize the authority of *Sears Roebuck & Company v. Stiffel Company,* 376 U. S. 225, 11 L. Ed. 661, 84 S. Ct. 784 (Reh. Den. 376 U. S. 973), and *Compco Corporation v. Day-Brite Lighting, Inc.,* 376 U. S. 234, 11 L. Ed. 669, 84 S. Ct. 779 (Reh. Den. 377 U. S. 913), both of which were decided on March 9, 1964, thus during the pendency of this dependent proceeding, and four days after the service and filing of the respondents' answer herein, and the completion thereby of the making up of the basic issues in it. It is, therefore, recognized that, as is made clear by the *Sears Roebuck* and *Compco* cases:

> "an unpatented article, like an article in which the patent has expired, is in the public domain and may be made and sold by whoever chooses to do so;"

and that a state's unfair competition law cannot, consistively with the federal patent laws, impose liability for, or prohibit, the copying of an article which is protected by neither a federal patent nor a copyright. To the effect of the most recent clause hereof, the Supreme Court answered a question tendered to it in both of those cases. However, in both of the cases, the Supreme Court recognized the authority of the states to provide protection against fraudulent or deceptive practices in the competitive area, otherwise generally open.

So, this court recognizes that a person, desiring to compete with the producer and marketer of an unpatented item of farm equipment, may licitly procure a specimen of the equipment that has engaged his interest, study it, dismantle it, and, from that investigation, actually duplicate it, and place his duplication on the market. But he may not come by his information by any chicanery or materially dishonest means, or in the commission of a breach of trust or confidence, or in the betrayal of the fidelity by him owed to his employer or business associate, who or which is the maker and marketer of the equipment already in the field. Nor may he deceptively mislead prospective customers touching the source and producer of the product he offers to the trade. And the law administered in the courts of the states and in the federal judicial system imposes and enforces that restraint. Brief allusion is now made to some of the authority disclosing such a course.

It is said, concerning unfair competition, in 87 C. J. S. 313, Title, Trade-marks, etc., Section 87, that:

> "Injunctive relief is not confined to the protection of those having trade-marks and trade-names, but reaches beyond to encompass all cases in which it is evident that fraud and deception are practiced by one in disparaging or capturing the trade of a competitor. The basis for the intervention of a court of equity and the granting of injunctive relief to restrain unfair competition is either subterfuge, piracy, wrongdoing or unfair tactics of the competitor."

In the same textual authority, and under the same title, but in Volume 87, at pages 244 and 245, appears this language:

> "... while the rule may once have been otherwise, unfair competition is not confined to the passing off of the goods of one for those of another, and the 'palming off' theory is no longer the sole and exclusive criterion in determining the right to relief against unfair competition. The presence of elements of fraud or deception is not an indispensable condition for equitable relief, and the courts have, in some instances, enjoined a defendant from continuing trade practices which are unethical and constitute an infringement of plaintiff's property rights, even though they do not constitute a representation that the goods or business of the defendant are the goods or business of another. There may be unfair competition by misappropriation as well as by misrepresentation, that is, the doctrine of unfair competition has been extended to permit the granting of relief in cases where there was no fraud on the public but where one, for commercial advantage, has misappropriated the benefit or property right of another. Protection will now be afforded regardless of palming off where there is a copying or imitation under circumstances generally classified as unfair competition, and relief extends to cases where one person vends the products of another as his own.
>
> "In applying a broader concept of the meaning of unfair competition it has been held that a competitor cannot obtain the trade of another by unfair means, and, when the rights and privileges of one competitor are liable to conflict with those of another, each party is under a duty to conduct the business so as not unnecessarily or unfairly to injure that of the other."

In the frequently cited case of *International News Service v. The Associated Press,* 248 U. S. 215, 63 L. Ed.

211, 39 S. Ct. 68, the Supreme Court of the United States vindicated the right to injunctive relief in behalf of an agency functioning as a gatherer, "at pains and expense," of news, in the resulting status of the owner of a property right in the fruits of its endeavor, as against a rival in the same enterprise, which obtained the gatherer's news from its earliest publication, or from the producer's customers, and, for a price, distributed to its own customers either the producer's actual release, or a modified version of it, *parce detorta.* In the course of the prevailing opinion in the case, the court said:

> "Obviously, the question of what is unfair competition in business must be determined with particular reference to the character and circumstances of the business. The question here is not so much the rights of either party as against the public but their rights as between themselves. See *Morison v. Moat,* 9 Haro. 241, 258. And although we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves. For, to both of them alike, news matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise. Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as *quasi* property, irrespective of the rights of either as against the public.

* * * * *

"It is said that the elements of unfair competition are lacking because there is no attempt by defendant to palm off its goods as those of the complainant, characteristic of the most familiar, if not the most typical, cases of unfair competition. *Howe Scale Co. v. Wyckoff, Seamans & Benedict,* 198 U.S. 118, 140. But we cannot concede that the right to equitable relief is confined to that class of cases. In the present case the fraud upon complainant's rights is more direct and obvious. Regarding news matter as the mere material from which these two competing parties are endeavoring to make money, and treating it, therefore, as *quasi* property for the purposes of their business because they are both selling it as such, defendant's conduct differs from the ordinary case of unfair competition in trade principally in this that, instead of selling its own goods as those of complainant, it substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own.

"Besides the misappropriation, there are elements of imitation, of false pretense, in defendant's practices. The device of rewriting complainant's news articles, frequently resorted to, carries its own comment. The habitual failure to give credit to complainant for that which is taken is significant. Indeed, the entire system of appropriating complainant's news and transmitting it as a commercial product to defendant's clients and patrons amounts to a false representation to them and to their newspaper readers that the news transmitted is the result of defendant's own investigation in the field. But these elements, although accentuating the wrong, are not the essence of it. It is something more than the advantage of celebrity of which complainant is being deprived."

Upon a pattern much larger than, but in essence indistinguishable from, the situation presently before the court, *Presnel Steel Car Company v. Standard Steel Car Company,* 210 Pa. 464, 60 Atl. 4, was decided by the Supreme Court of Pennsylvania. Plaintiff therein was a corporate manufacturer of steel railroad cars, and parts and equipment therefor. It maintained an engineering department which, among other things, designed for it a variety of such cars, preparing blueprints and drawings therefor, to the end that the railroads to which they were submitted might select from them plans for cars they desired to purchase. In the plaintiff's engineering department was one who was chief engineer. He joined with others, including some who were plaintiff's employees, in forming a new and competing car manufacturing corporation, with the former chief engineer as its president. In his favored position, he and the new corporation procured many of plaintiff's blueprints and drawings from railroads to which as prospective customers they had been sent, *supra.* Plaintiff sought injunctive relief against both the new corporation and its president forbidding the use of the prints and drawings, on the grounds of (a) its asserted property in the designs revealed in the prints, and in themselves the prints, and (b) a breach of good faith in the delivery of the prints to the new corporation by railroads to which they had been entrusted for a limited purpose. The trial court ordered the return to plaintiff of the prints and drawings, and granted the injunction sought against their use by the defendants. The new corporation appealed, and the Supreme Court affirmed. In the course of its ruling, it declared:

> "We see no grounds whatever upon which the appellant can claim ownership in the prints, or the right to use them in its business of manufacturing and selling steel cars and car parts in competition with the plaintiff. It is not pretended that the defendant company paid any consideration for them to the plaintiff or to the parties from which it received them. The right to hold them as against the plaintiff is based simply on the fact that the prints were delivered to the defendant company by the railroad companies so that they might obtain their cars and car parts from the defendant instead of the plaintiff, and thus, by the use of the plaintiff company's own designs, enable them to give their trade to its rival competitor. * * * These facts will, on reason and authority, as shown by the learned trial judge, confer jurisdiction on a court of equity, which will restrain the defendant company from making use of the prints in its business, and give such other and adequate relief as the rights of the injured party may require."

And, reasoning to its decision, the Supreme Court quoted approvingly this language from the trial court's ruling:

> " 'That the Pressed Steel Car Company had an exclusive property in the drawings in its offices, and no one, whether draftsmen or other employee, had any right to have blue prints made for his own use or the use of others. It matters not that the parts of the cars were not protected by patents, and that the process of manufacture was not a secret one. A certain amount of publicity is unavoidable in any manufactory, but an unlocked door is not an invitation to the passerby or to the servant of the household to help himself. Neither does a manufacturer abandon his property in a design by delivering it or a copy to another for a restricted purpose, nor by a limited publication. His property rights will

> be protected in such cases, and he will be protected against a breach of trust, confidence, or contract, and especially will he be protected against a breach of the confidence existing between employer and employe. These principles are supported by a number of well-considered cases. On the rights of an employer against an employe, the following cases, cited in the plaintiff's brief, are in point: Lamb v. Evans, L. R. (1892) 3, Chan. 462, where canvassers, employed to obtain advertisements for the plaintiff's trades directory and to supply him with blocks and materials necessary for producing the advertisements, were held to have no right to use these blocks and materials for the purpose of a rival publication. The court cites a case where a cutter, in the employment of a tailor, was enjoined from using copies of customers' patterns made by him before he left his master. * * *"

Regarded as instructive for its disposition of its first count is *Smith v. Dravo Corporation* (7 Cir.), 203 F. (2) 369, in which, incidentally, Pennsylvania law was applicable, as in the last previously cited case. Reasoning to its decision reversing the District Court's dismissal of the first count in quest of an injunction, the Court of Appeals said:

> "It is unquestionably lawful for a person to gain possession, through proper means, of his competitor's product and, through inspection and analysis, create a duplicate, unless, of course, the item is patented. But the mere fact that such lawful acquisition is available does not mean that he may, through a breach of confidence, gain the information in usable form and escape the efforts of inspection and analysis. The fact that a trade secret is of such a nature that it can be discovered by experimentation or other fair and lawful means does not deprive the owner of the right to protection from those, who would secure

possession of it by unfair means." Nims, Unfair Competition and Trade Marks, Sec. 148.

Reference, without detailed analysis or quotation, is also now made to *S. F. Myers Company v. Tuttle* (C. C. S. D. N. Y.), 188 F. 532; *A. O. Smith Corporation v. Petroleum Iron Works Company* (6 Cir.), 73 F. (2) 531; and *K & G Oil Tool & Service Company v. G & G Fishing Tool Service* (Tex.), 314 S. W. (2) 702.

The foregoing authorities are selected from many judicial decisions uniformly to like effect, and might be supplemented in substantial measure. But the court is disinclined unnecessarily to expand a memorandum which is already of an intolerable length.

It is now added factually that in the submission of this subordinate proceeding upon trial, the petitioner has convinced the court that the facts by it alleged in its Petition to Modify and for equitable relief are true in all respects, and, particularly, that the respondents have not complied with the earlier turnover order and amended order of the court entered herein; that the respondents and their agents, servants and employees have used, and are continuing to use, blueprints, drawings and tracings belonging to Kelly Ryan Equipment Company, and more recently through purchase, to the petitioner, or copies thereof; and that the respondents and their agents, servants and employees have used, and are continuing to use, information and data by the respondents obtained while those of said blueprints, drawings and tracings, and copies thereof, which they did return pursuant to the orders of this court, were wrongfully in the possession of the respondents, their agents, servants and employees, *supra.* And, in consequence of the totality of facts herein found and announced, the petitioner is deprived of, and unable to receive, the benefit in full for which it bargained in contracting to purchase the assets of Kelly Ryan Equipment Company (less minor and identified exceptions therefrom, *supra*), and will continue to be so deprived and disabled unless the prayer of its Petition to Modify, for injunctive relief be granted by the court. (For the character of the injunctive relief so sought, see immediately *infra,* the relief of which the grant is herein announced.)

Synopsized and somewhat restated, the prayer of the Petition to Modify demands essentially the following several items of relief:

(1) The court's direction that the respondents and each of them forthwith surrender to the petitioner possession of all blueprints, drawings and tracings belonging to Kelly Ryan Equipment Company, and by Emmett Hampton taken from the files of Kelly Ryan Equipment Company, and copies thereof, not heretofore surrendered to the petitioner;

(2) The making and entry by this court of an order, so modifying the amended order of the court for turnover heretofore entered at further to restrain and enjoin the respondents and each of them, and the agents, servants and employees of the respondents and each, or either, of them, from the production of any item or items, components or parts for feeder wagons, elevators, and spreaders or manure spreaders, (or of any of such equipment articles), which are interchangeable with the items, components and parts for feeder wagons, elevators and spreaders or manure spreaders, covered by blueprints, drawings and

tracings, of Kelly Ryan Equipment Company, so taken from its files by Emmett Hampton, ~~or~~ any copies thereof.

It is now announced that the court presently grants the relief thus by the petitioner demanded, including both the direction identified in (1) immediately above, and the injunctive relief identified in (2) immediately above, in each and all of its aspects. And judgment therefor is now made and given, and as a further aspect of such judgment, the costs of this subsidiary proceeding, not already explicitly assessed are assessed against the respondents, and each of them.

The court presumes, before directing the preparation of the formal judgment now announced, to set down these observations touching the two phases of such judgment.

Concerning the directory order, part (1) of the announced judgment, the court is not unaware of the respondents' position that they have actually, and after two orders of the court, delivered to the petitioner all copies made for Emmett Hampton of the blueprints, drawings and tracings of Kelly Ryan Equipment Company abstracted by him from the corporation's files. But on balance, the court has felt compelled to conclude, and has concluded, that such position is contrary to the fact. The making of the order for further return appears, therefor, to be appropriate. The court, with the assistance of the parties and counsel, will have to deal in due season with such compliance (or failure of compliance) with that order as shall ensue. In a slightly different context, much the same problem is involved in the direction, insofar as it involves, or may involve, photographs or other copies, made by or for Emmett Hampton of Standard Blue Print Company copies, *supra*. And, still dealing with section (1) *supra* of the prayer (as identified by the court), the court, upon the record before it, has not found a failure by Emmett Hampton to return to the files of Kelly Ryan Equipment Company, any of its original blueprints, drawings and tracings by Emmett Hampton taken from those files. Hence, for the present at least, the order for return is limited to *copies* of such blueprints, drawings and tracings made at the procurement of, and for, Emmett Hampton. In the preparation of this feature of the written judgment, the proper limitation of the order for further return should be considered and provided.

Concerning the injunctive feature within (2) of the prayer, the court does not now enjoin the respondents or either of them from all, and every manner of, competition in the area involved with the petitioner. The injunctive relief, whose allowance has already been announced, *supra*, is granted as the most practicable means of barring the respondents from the enjoyment of benefit or advantage from Emmett Hampton's unwarranted, and presumptuous taking of the blueprints, drawings and tracings, belonging to, and from their presumed security in the possession of, their owner, his own then recent employer and business associate. The injunctive order is not limited to the Model 48 Feeder Wagon, for the thrust of the taking by Emmett Hampton was demonstrably and unmistakenly not so limited. The circumstance that, in the short interval between the taking and his involvement in this subsidiary proceeding, Emmett Hampton had not progressed with his plans respecting elevators, and spreaders or manure spreaders, or with feeder wagons, other than Kelly Ryan Equipment Company's Model 48, should not, and does not, operate to exclude those envisioned but actually unreached items of equipment from the impact of the injunction.

Counsel for the petitioner will prepare forthwith a typewritten judgment in accordance with the foregoing announcement, and submit the same promptly to counsel for the respondents for examination, and approval as to form, or suggestions of amendments thereto. And if such judgment as so prepared be so approved as to form, counsel for petitioner will submit it to the court for signature and filing. But if objection in respect of form to such judgment, or suggestion or formal amendment thereof, be made, counsel for petitioner will submit such proposed judgment, together with such objection or suggested amendment, to the court for settlement, and, as settled, for signature and filing.

The clerk will transmit forthwith by United States mail copies of this memorandum to

(a) Lyle E. Strom, Esq., and Charles A. Schorr, Esq., and

(b) John J. Hanley, Esq., and Clayton H. Shrout, Esq.

Dated: March 10, 1966.

FOOTNOTES

1. By the foregoing statement, it is intended only to identify the corporation's principal business activity. The record before the court leads to the conclusion that, among its operations, was the execution of manufacturing work, probably on a relatively large financial scale, in pursuance of specific contractual undertaking or undertakings.

2. It will readily be understood that, in the usual significance of the "operation" of a business, the trustee's operation has naturally been sharply minimized since, and in direct consequence of, the sale of assets of Kelly Ryan Equipment Company, to which reference is made later herein.

3. It should be kept in view that neither such offer was for all of the property and assets of the debtor. Nor, for that matter, was the offer which was finally accepted, *infra*. Each offer defined the assets for which it was individually made.

4. Whether correctly and necessarily or not, the operative date of the sale thus approved was, by the trustee and by the purchaser, considered to be the filing date, September 20, 1963 rather than the date of the hearing and announcement of the order. The court has undertaken to keep that position in view, *infra*.

5. No effective service of notice of the filing of, and hearing on, that petition was effected upon the supposed entity designated as "Hampton Enterprises," of whose actual existence the record leaves substantial doubt. And, as to it, the petition was later dismissed, *infra*. Hereafter, for convenience and in the service of brevity,

Blair Manufacturing Company is identified as "petitioner" and Emmett Hampton and Hampton Distributing Company, together, are designated as "respondents."

6. Inexactly characterizing themselves as "defendants" rather than as "respondents."

7. What the pleaders mean by that identification is obviously a reference to the attorney—or an attorney—for the petitioner.

8. It is now observed in passing that the respondents had earlier, and by formal motion (filing 652), demanded trial by jury, which was resisted by the petitioner (filing 650), and was denied by the court (filing 655). It is too obvious for formal discussion that the issue tendered for trial was not one appropriate for trial by jury, if, as the court is persuaded, and shortly hereinafter announces its conclusion that, the issue tendered by the petitioner's petition to modify (filing 626) is within the summary jurisdictional competency of this court as a court of bankruptcy.

9. No patent provides protective coverage for any appliance, or component part, in respect of which the petitioner claims relief.

10. Both the petitioner and the corporate defendant are Nebraska corporations with their principal place of business at Blair. And Emmett Hampton is a citizen of Nebraska, and a resident of Blair.

11. In mentioning *Hoffman v. McClelland, supra,* this court is quite aware that in that case, upon analysis of the record before it, the Supreme Court correctly concluded that "The trustee who was holding the property and administering the trust was not an appointee of the District Court"

(i. e., the United States District Court) "but of the state court of McLennan County. The District Court had not taken over the administration of the trust, nor had it otherwise drawn unto itself the custody and control of the property." It is not impossible that the quoted language of the opinion may be characterized as *dictum*. But what matters is that it is a fair and accurate statement of the law, as may be gathered from the examination of the Supreme Court opinions which it cites as supporting authority. Those cases include *Oklahoma v. Texas*, 258 U. S. 574, 581; *Minnesota Company v. St. Paul Company*, 2 Wall. 609, 632; and *Krippendorf v. Hyde*, 110 U. S. 275, 281.

12. That is to say, items of claim numbered (1), (2), and (3) summarized, *supra*.

13. Which they also cite intelligibly as *"In re Bettinger Corporation."*

14. Bolton's visit was an incident largely determinative of the jurisdictional issue whether Walker Manufacturing Company had constructive possession of the right in controversy; and November 28, 1960 was the critical date of the filing by Bettinger Corporation of the petition for an arrangement under Chapter XI of the Bankruptcy Act.

15. This is not to be understood as an absolute limitation of the business of Kelly Ryan Equipment Company to the manufacturing and selling of items of farm equipment. Without specification, the record before the court discloses its engagement in other substantial activities, *supra*. But the farm equipment field constituted its principal business; and, of practical present significance, includes the products involved in this subsidiary proceeding.

16. Hampton Distributing Company is and since August 1, 1958 has been, a corporation organized under the laws of Nebraska, with its principal place of business at Blair, Nebraska. August 1, 1958 is the date of the filing of its Articles of Incorporation in the office of the Secretary of State of Nebraska. The court, therefore, accepts as essentially correct, Emmett Hampton's statement as a witness upon the trial of this subsidiary proceeding, to the effect that he "believe(d)" it was in July of 1958 "that it was incorporated."

17. As a witness, the respondent, Emmett Hampton characterized those three shares as "a token stock of one share each."

18. In the specification of the footnoted date, the court does not rule out the possibility that the office arrangement here mentioned substantially antedated January 1, 1957. Indeed, the entire evidence leads the court to think that it was probably effective somewhat earlier than that, and perhaps from the inception of Emmett Hampton's service as sales manager. But the court purposefully makes its finding effective as of a date which in the evidence is directly and positively identified. Moreover, the court is quite aware that, as a corporate entity, Hampton Distributing Company did not come into being until August 1, 1958, *supra.* Occupancy of office space earlier than that was thus, by Emmett Hampton in his own name, or under the preincorporation trade name of Hampton Distributing Company.

19. Without unnecessary particularization, the court signifies its awareness of some disparities, at least in language, between the descriptions of the assets described in the several offers to pur-

chase which eventually came before the court on September 19, 1963, *supra.*

20. Standard Blue Print Company dealt and deals in "engineers', architects' and artists' supplies, blue-printing and photo-tracings."

21. That is, the order entered October 23, 1963, of which the signed draft was filed October 30, 1963 (filing 619), and the Amended Order entered and filed November 27, 1963 (filing 624) mentioned *supra.*

22. See receipts (filings 620 and 631 with itemization of the prints severally identified in them) mentioned, *supra.*

23. It is obvious that the footnoted date casts substantial doubt on the supposition advanced upon the trial; that there had been no taking of any prints, drawings and tracings until on or after September 19, 1963. However, the court does not consider the precise date of taking to be a decisive factor in its present ruling, *supra.*

24. The court has in view an answer by Emmett Hampton to a question whether he stated that he ordered one copy of each print, and proceeds on the assumption that such instruction was given and was probably followed. Yet, it is not considered as clearly established that exactly 967 original reproductions were made, one of each of 967 original prints.

25. By which the court signifies not that the testimony mentioned is completely incredible, but rather that it is so vague, generalized and imprecise as to be uninstructive.

26. Upon the trial this directory was introduced late in the hearing as Exhibit 24. Over objection of the respondents, the court received it, though with a signified doubt whether it was technically

an item of rebuttal evidence, at the same time disclaiming on the court's part any purpose of drawing too narrowly the distinction between primary and rebuttal evidence. And at the court's suggestion, counsel have adverted to its admissibility in their briefs. Let it be understood that the court persists in its ruling receiving the exhibit.

APPENDIX C

(Judgment)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 18,465. September Term, 1966.

Emmett Hampton and Hampton Distributing Company, *Appellants,* vs. Blair Manufacturing Company.	Appeal from the United States District Court for the District of Nebraska.

This cause came on to be heard on the record from the United States District Court for the District of Nebraska, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court appealed from, be, and the same is hereby, modified by striking therefrom all of paragraph 2 of said Order, and the portion of the Order contained in Paragraph 2 is hereby vacated.

And it is further Ordered by this Court that this cause be, and it is hereby, remanded to the said District Court for proceedings consistent with the Opinion of this Court this day filed herein.

April 5, 1967.

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JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 342

BLAIR MANUFACTURING COMPANY,
Petitioner,

vs.

EMMETT HAMPTON
and
HAMPTON DISTRIBUTING COMPANY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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o———o———o

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 374 F. (2d) (May 29, 1967 issue of Advance Sheets) and is printed in Appendix A of the Petition for Writ of Certiorari. The opinion of the United States District Court for the District of Nebraska, by John W. Delehant, Senior Judge, is unreported but is printed as Appendix B of the Petition for Writ of Certiorari.

JURISDICTION

Judgment of the Court of Appeals was entered April 5, 1967. Motion for rehearing was filed April 24, 1967 and was denied May 3, 1967. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

(1) Do this Court's decisions in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 and in *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 control in the case at bar?

(2) Is the opinion of the Court of Appeals herein in conflict with the opinions of the Court of Appeals for the First and Fourth Circuits?

STATEMENT OF THE CASE

Kelly-Ryan Equipment Company was a manufacturer of farm implements located in Blair, Nebraska. It was a corporate entity. It petitioned for reorganization under the bankruptcy laws of the United States a number of years ago. It operated under the aegis of a Trustee until September 19, 1963. Then by direction of the Federal District Court for Nebraska, it was sold to the Blair Manufacturing Company of Blair, Nebraska.

Prior to the commencement of the Reorganization Proceedings of Kelly Ryan Company, the respondent Emmett Hampton was its sales manager. After these proceedings were initiated, Hampton's direct employment with the company terminated. However, the

Trustee and Hampton worked out an arrangement whereby Hampton was a distributor for the Company with his office in the company's offices. This was in 1956. Hampton continued to sell Kelly Ryan Equipment as an independent entrepreneur until its purchase by Blair Manufacturing Company on September 19, 1963. During this period, Hampton had exposure to the Kelly Ryan manufacturing processes and all documents pertaining to such manufacture. The principal parts manufactured by Kelly Ryan were feeder wagons, manure spreaders and elevators. None of these items or their component parts are patented. The facts do not state nor do they warrant an inference that Hampton was in a confidential or semi-confidential relationship to Kelly Ryan.

Hampton acquired some drawings and tracings of certain component parts of the Kelly Ryan Model 48 Feeder Wagon which he had blueprinted. Shortly after the sale of Kelly Ryan to Blair Manufacturing Company, an action was commenced within the framework of the Reorganization proceedings by Blair Manufacturing Company to compel Hampton to turn over to Blair all of such drawings, tracings and blueprints. After a hearing on October 23, 1963, the Court ordered Hampton to turn over to Blair all such drawings, tracings and blueprints with which Hampton complied. Thereafter, an action was instituted by Blair, again within the framework of the Reorganization, complaining that Hampton had not turned over all of the blueprints, tracings and drawings and praying for permanent injuntive relief against Hampton and Hampton

Distributing Company to prevent the manufacture and sale of any farm equipment containing interchangeable parts with Kelly Ryan equipment.

Hampton Distributing Company is a corporation formed by Emmett Hampton for the manufacture and sale of farm equipment. The Court should note that Kelly Ryan, an individual, was the head of Kelly Ryan Equipment Company prior to the reorganization and is and has been all during these proceedings, President of Blair Manufacturing Company.

The Court ultimately on May 24, 1966, decided the matter in favor of the petitioner herein, Blair Manufacturing Company and in substance permanently restrained Emmett Hampton and Hampton Distributing Company from manufacturing and selling feeder wagons, elevators and manure spreaders containing parts interchangeable with Kelly Ryan feeder wagons, elevators and manure spreaders. Emmett Hampton and Hampton Distributing Company's motion for a new trial was overruled and an appeal was perfected to the United States Court of Appeals for the Eighth Circuit.

The Eighth Circuit Court of Appeals reversed the District Court's judgment.

REASONS FOR NOT GRANTING WRIT

One of the questions presented by the petitioner herein is whether or not the Patent Laws of the United States preempted the field and thereby precluded the assertion of common law rights to the protection of blueprints, drawings or trade secrets as against one who has allededly unlawfully acquired them. In *Sears, Roebuck & Co. v. Stiffel Co.,* 376 U.S. 225, one of the questions presented to this court was whether the use of the State laws against unfair competition was compatible with the Federal Patent Laws. This Court held therein that the Federal Patent and Copyright Statutes, like other laws of the United States enacted pursuant to constitutional authority are the Supreme laws of the land. When State Statutes infringe upon the area of these Federal Statutes, it is familiar doctrine that the Federal policy may not be set at naught or its benefits nullified. This is true even though the State Law is enacted in the exercise of otherwise lawful power. Thus, unequivocally, the Sears case, supra, answers the question of whether or not the Federal Patent Laws have preempted the field and precluded the use of common law rights in the protection of blueprints, drawings and so-called trade secrets.

There is no substance to the Petitioner's contention that the Eighth Circuit's decision in this case is in conflict with the opinions of the Court of Appeals for the First and Fourth Circuits. This would, in effect, be saying that this Court's decision in *Sears, Roebuck & Co. v. Stiffel Co.* and *Compco Corp. v. Day-Bright Lighting, Inc.* conflict with the Courts of Appeal opinions of the First and Fourth Circuits in the *Servo. v. General Electric,* 337 F. 2d 716 and *Atlantic Wool Combing Company v. Norfolk Mills, Inc.,* 357 F. 2d 866 cases respectively. Such a conclusion is incorrect. These cases are distinguishable.

In the Sears case, supra, Sears copied a floor to ceiling pole lamp and the defendant, Stiffel, brought a patent infringement and unfair competition suit in the United States District Court for the Northern District of Illinois. In this instance, Sears had copied a pole lamp which was designed by Stiffel. The pole lamp which was made by Stiffel had received a patent and was placed on the market for sale. The court found during the course of the trial that the patents of Stiffel were invalid and then went on to say that an unpatented article is in the public domain and may be made and sold by whoever chooses to do so. In the *Compco v. Day Brite* case, supra, which was a companion case to the *Sears* case, supra, both Compco and Day-Brite were manufacturers of lighting fixtures of a kind widely used in offices and stores. Day-Brite had secured an invalid patent on a type of reflector. In both of these cases, the products, like in the case at bar, were for all intents and purposes unpatented and were placed on the open market for consumption by the general public.

In the Servo v. General Electric case, supra, Servo charged General Electric with unlawful infringement of three patents relating to the use of a device called a "hot box detector" and also charged General Electric with acts of unfair competition and unjust enrichment.

In the *Servo* case, supra, the Fourth Circuit concluded that the patents which Servo claimed to have were invalid but did find that General Electric had copied Servo's 575. In this case, General Electric obtained the information and blueprints from Southern Railroad in Salisbury, North Carolina. Servo had entered into a written agreement with Southern for the installation of Servo's 575 patented article for testing. This agreement contained the following provisions:

> "Servo Corporation of America has a proprietary interest in the information contained herein, and in some instances has patent rights in the systems and components described and requests that you distribute it only to those responsible people within organization who have an official interest. Insofar as the material contained in this document is novel Servo Corporation of America retains a proprietary interest in its development and manufacture."

The Court also found that the Vice President of Southern in charge of this testing was familiar with the terms of the agreement and understood it was to be experimental work and not to be disclosed. Also in its opinion the Court in this case found that the particular instrument referred to as patent 575 was a trade secret which was imparted to another in confidence.

The *Atlantic Wool* case, supra, was a tort action based on the alleged appropriation of a trade secret. In this case, the plaintiff and defendant were competitors in the dehairing of raw cashmere. The plaintiff had designed a special piece of equipment new to the business of dehairing. Plaintiff presented this piece of equipment to a company called Lawton to be manufactured. Part of the agreement was that Lawton would manufacture this equipment solely for the plaintiff without disclosure of it to anyone. Ronald Letoile, a mechanic at Atlantic Wool, terminated his employment and commenced work for the defendant. While employed by Atlantic Wool Letoile became familiar with the dehairing machine in question. Letoile after employment by the defendant, revealed the nature of the machine to the defendant and advised that Lawton had manufactured the equipment. The defendant then solicited Lawton and Lawton manufactured the dehairing machine for the defendant.

The Court in the *Atlantic Wool* case, supra, concluded that the plaintiff's design was not public knowledge and was entrusted to Lawton for limited purposes.

In the *Sears* case, supra, and the *Compco* case, supra, it will be observed that the Court found that the item was not patented, was put out for public consumption and was not a trade secret. In the *Atlantic Wool* case, supra, and the *Servo* case, supra, the Court found that the particular articles were not for public consumption or knowledge and that they were trade secrets. In the Hampton case, the particular article which Hampton copied and distributed was not patented, was put in the public domain by Kelly Ryan, and, was therefore not a trade secret.

Ballantine's Law Dictionary defines a trade secret as "any character, peculiar and important to the business of the employer and known only to its owner and those of its employees to whom it is necessary to confide in order to apply it to the use for which it is intended." It is clearly obvious that a feeder wagon which is unpatented and which is sold generally to the public cannot fall within the meaning of a trade secret.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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